Plff in Error submits

Argument filed

March 12. 1880

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~496.~~ 506

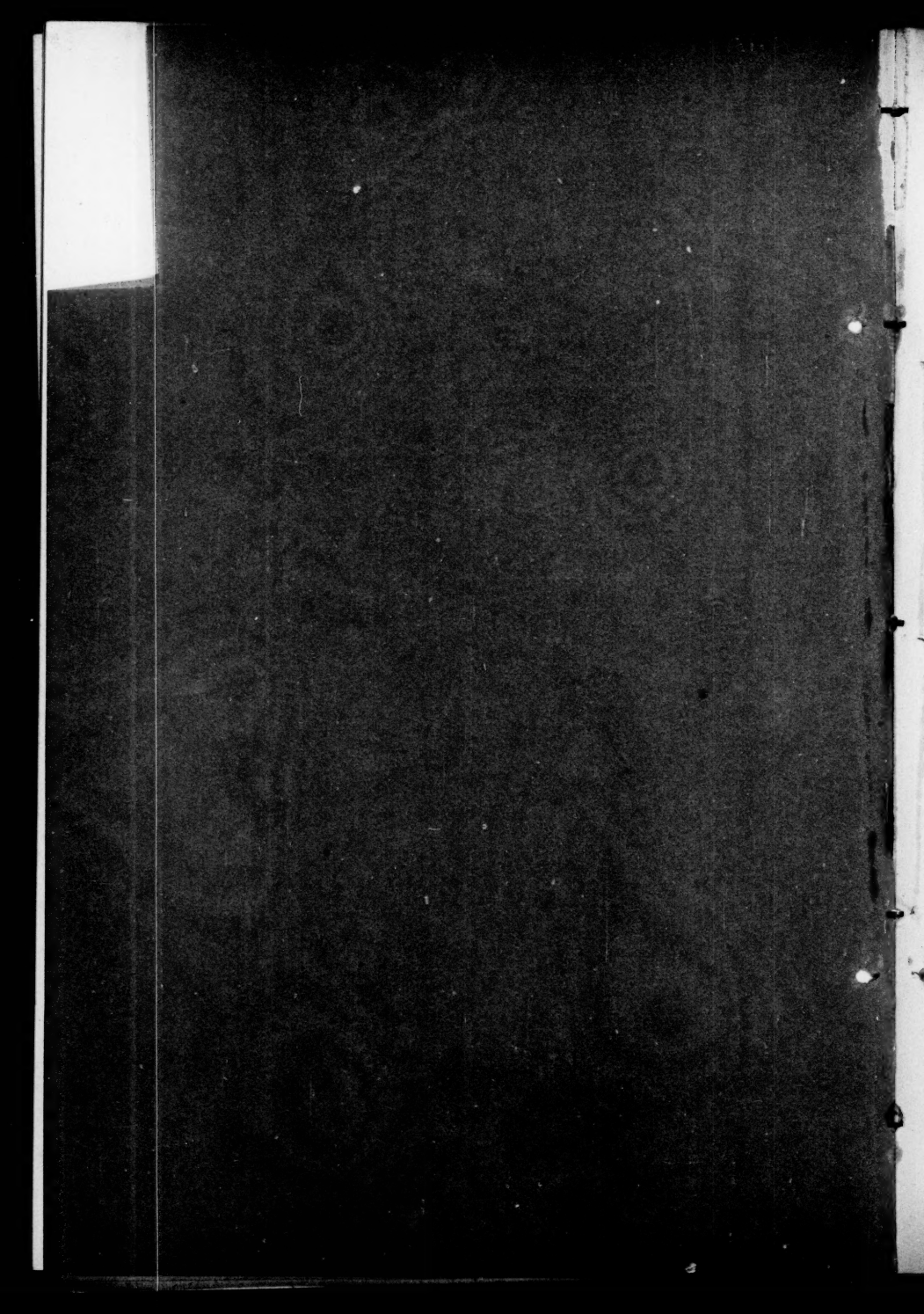
THE PITTSBURGH, CINCINNATI, AND ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN HECK, WHO SUES FOR THE USE OF SAMSON G. LANE, NATHANIEL J. OWENS, AND JOHN LEACH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 9, 1877.



SUPREME COURT OF THE UNITED STATES.

No. 496.

THE PITTSBURGH, CINCINNATI, AND ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN HECK, WHO SUES FOR THE USE OF SAMSON G. LANE, NATHANIEL J. OWENS, AND JOHN LEACH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the Circuit Court of the United States for the Northern District of Illinois, held in the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges of said court, on Saturday, the sixteenth day of December, in the year of our Lord one thousand eight hundred and seventy-six, and of our independence the one hundred and first year.

WILLIAM H. BRADLEY, *Clerk.*

JOHN HECK, WHO SUES FOR THE USE OF SAMSON G. Lane, Nathaniel J. Owens, and John Leach,
vs.
PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY Company. } Assumpsit.

Be it remembered, that on the 9th day of December, A. D. 1875, came said plaintiff, by O. B. Sansum, his attorney, and filed in the office of the clerk of the Circuit Court of the United States for said Northern District of Illinois, at Chicago, in the district aforesaid, his bond for costs and præcipe for a writ of summons, and at the same time filed his declaration in said entitled cause, which
2 said bond, præcipe, and declaration are respectively in the words and figures following, to wit:

Bond for Costs.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } *ss.*

Circuit Court, October term, A. D. 1875.

JOHN HECK, FOR USE OF SAMSON G. LANE, Nathaniel J. Owens and John Leach,
vs.
PITTSBURGH, CINCINNATI AND SAINT LOUIS Railway Company. } In assumpsit.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this ninth day of December, A. D. 1875.

O. B. SANSUM.

Endorsed: Filed Decr. 9th, A. D. 1875. Wm. H. Bradley, clerk.

3 *Præcipe.*

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } *ss.*

In the Circuit Court of the United States for the Northern District of Illinois. To the December term, A. D. 1875.

JOHN HECK, WHO SUES FOR THE USE OF SAMSON G. Lane, Nathaniel J. Owens, and John Leach, Plaintiffs,
vs.
PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY Company, Defendants. } Assumpsit.

The clerk of said court will please issue a summons in the above-entitled cause, directed to the marshal of said district, in a plea of trespass on the case upon promises to the damage of the plaintiffs $10,000, returnable to the December term of said court.

Chicago, Ills., December 8th, 1875.

O. B. SANSUM, *Atty. for Plffs.*

To WILLIAM H. BRADLEY, esq., *Clerk.*

Endorsed: Filed Dec. 9, 1875. Wm. H. Bradley, clk,

4 UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } *ss.*

In the Circuit Court of the United States for the Northern District of Illinois. To the December Term, A. D. 1875.

John Heck, who sues for the use of Samson G. Lane, Nathaniel J. Owens, and John Leach, citizens of the State of Indiana, plaintiff in this suit, by his attorney, O. B. Sansum, complains of the Pittsburgh, Cincinnati and St. Louis Railway Company, citizens of the State of Pennsylvania, defendants, who have been summoned, &c., by a plea of trespass on the case upon promises.

For that, whereas, the said defendants on, to wit, the first day of January, 1870, at Howard county, to wit, at the district aforesaid, promised the said plaintiff to buy of the said plaintiff a large quantity, to wit, eleven thousand cords of firewood, to be delivered by the said plaintiff to the said defendants from time to time during the said year A. D. 1870, at places to be designated by the said defendants, along the line of said defendants' railway, between Kokomo and Galveston, in said county, and to pay the said plaintiff for the same at the rate of two dollars and forty cents per cord for each and every cord aforesaid. And in consideration thereof, the said plaintiff on, to wit, the day and year first aforesaid, at said Howard county, to wit, at said district, promised the said defendants to sell to the said defendants the aforesaid firewood, to wit, eleven thousand cords of firewood, and to deliver the same to the said de-

fendants from time to time during the said year A. D. 1870, at places to be designated by the said defendants along the line
5 of the said defendants' railway, between Kokomo and Galveston aforesaid, and to accept of the said defendants as payment therefor the said sum of two dollars and forty cents per cord for each and every cord thereof.

And the said plaintiff avers that from time to time within the said year A. D. 1870, the said plaintiff delivered to the said defendants large quantities of firewood, to wit, eleven thousand cords of firewood, at places designated by the said defendants along the line of the said defendants' said railway, between Kokomo and Galveston aforesaid, for all of which the said defendants have paid the said plaintiff at the said rate of two dollars and forty cents per cord, except as to a large quantity of said firewood, to wit, three thousand one hundred and fifty-three cords thereof, and that as to the said last-mentioned quantity the said defendants then and there undertook and promised to pay the plaintiff for the same at the rate aforesaid whenever they, the said defendants, should thereafter be requested, yet the said defendants, not regarding their said promise and undertaking, though often requested to pay the said plaintiff for the said last-mentioned firewood, have neglected and refused, and still do neglect and refuse, contrary to their undertaking and promise aforesaid.

And for that, whereas, the said defendants on, to wit, the first day of January, A. D. 1870, at Howard county, to wit, at the district aforesaid, promised the said plaintiff that if the said plaintiff would provide, cut, haul, and pile, from time to time during the year A. D. 1870, at places to be designated by the said defendants, along the line of said defendants' railway, between Kokomo
6 and Galveston, in said county, certain firewood, to wit, eleven thousand cords of firewood, the said defendants would, from time to time within the said year A. D. 1870, measure the same, as the same should be hauled, piled, and made ready for the defendants, and would pay the said plaintiff for the same at the rate of two dollars and forty cents per cord for each and every cord thereof.

And in consideration thereof, the said plaintiff on, to wit, the day and year first aforesaid, at said Howard county, to wit, at the district aforesaid, promised the said defendants to provide, cut, haul, and pile, from time to time during the year A. D. 1870, at places to be designated by the said defendants along the line of said defendants' said railway, between Kokomo and Galveston, in said county, certain firewood, to wit, eleven thousand cords of firewood, and to make the same ready for the said defendants to measure the same, and to accept from the said defendants the said sum of two dollars and forty cents per cord for each and every cord thereof.

And the said plaintiff avers that afterwards, to wit, during the said year A. D. 1870, from time to time within said year, the said

plaintiff did provide, cut, haul, and pile and make ready, at places designated by the said defendants along the line of said defendants' said railway, between Kokomo and Galveston, in said county, a large quantity of firewood, to wit, eleven thousand cords of firewood, for the said defendants to measure the same. And the said plaintiff avers that he was ready and willing at all times, and offered to allow the said defendants to measure all or any part of said firewood, but the said defendants neglected and refused to measure a large quantity thereof, to wit, seven thousand six hundred
7 and seventy-six cords thereof. And the said plaintiff further avers that while he was so ready and willing, and offered to allow the said defendants to measure the said last-mentioned firewood, a large quantity of said firewood, to wit, three thousand one hundred and fifty-three cords thereof, were, without the fault of the said plaintiff, consumed by fire.

And in consideration of the premises the said defendants then and there undertook and promised to pay the said plaintiff for the said last-mentioned firewood at the said rate of two dollars and forty cents a cord whenever the said defendants should thereafter be requested, yet the said defendants, not regarding their said promise and undertaking, though often requested to pay the said plaintiff for the said last-mentioned firewood, have neglected and refused, and still do neglect and refuse, contrary to their promise and undertaking aforesaid.

And whereas, also, the said defendants afterwards, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and seventy-one, at the place aforesaid, became and were indebted to the said plaintiff in a large sum of money, to wit, ten thousand dollars, for money before that time lent and advanced by the said plaintiff to the said defendants and at the special instance and request of the said defendants. And for other money by the said plaintiff before that time paid, laid out, and expended for the said defendants by the said plaintiff, and at the like request of the said defendants. And for other money by the said defendants before that time had and received to and for the use of the said plaintiff, and also in a like sum for goods, wares, and merchan-
8 dise before that time sold and delivered by said plaintiff to said defendants at their like special instance and request; and also in the like sum for the labor, care, and diligence of said plaintiff before that time done and performed by said plaintiff for said defendants and at the like instance and request of said defendants, and being so indebted, said defendants, in consideration thereof, then and there undertook and promised to pay said plaintiff said last-mentioned sum of money when thereunto afterwards requested. And being so indebted the said defendants, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff

the said sum of money in this count mentioned when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, accounted together with the said plaintiff, of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendants then and there were found to be in arrear and indebted to the said plaintiff in the further sum of ten thousand dollars of like lawful money as aforesaid. And being so found in arrear and indebted to said plaintiff the said defendants in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendants should be thereunto
9 afterwards requested.

Yet the said defendants not regarding their said promises and undertakings, but contriving, etc., although often requested so to do, have not paid said plaintiff either of said sums of money or any part thereof, but so to do have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of said plaintiff of ten thousand dollars, and, therefore, he brings suit, etc

O. B. SANSUM,
Attorney for Plaintiff.

Endorsed: Filed Dec. 9, 1875. Wm. H. Bradley, clk.

10 And on the same day, to wit, the 9th day of December, A. D. 1875, a writ of summons issued out of said clerk's office against said defendant in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } *ss.*
NORTHERN DISTRICT OF ILLINOIS. }

The United States of America to the marshal of the Northern District of Illinois, greeting:

We command you to summon Pittsburgh, Cincinnati and St. Louis Railway Company, if found in your district, to be and appear before our judges of our Circuit Court of the United States for the Northern District of Illinois, on the first day of the next term thereof to be holden at Chicago, in the district aforesaid, on the third Monday of December instant, to answer unto John Heck, who sues for the use of Samson G. Lane, Nathaniel J. Owens, and John Leach, of a plea of trespass on the case upon promises, to their

damage, as they allege, of ten thousand dollars, and have you then and there this writ.

11 Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this ninth day of December, in the year of our Lord one thousand eight hundred and seventy-five, and of our independence the 100th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

I served the within writ upon the Pittsburgh, Cincinnati and St. Louis Railway Company therein named by delivering a true copy thereof to Edwin Walker, attorney for said road, on the 15th day of December, A. D. 1875, not being able to find any other officer of said road in my district.

B. H. CAMPBELL, *U. S. Marshal.*
By L. O. GILMAN, *Deputy.*

Endorsed: Filed Dec. 17th, A. D. 1875. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 8th day of March, A. D. 1876, said defendant, by E. Walker, esq., its attorney, filed in the said clerk's office its plea in said entitled cause, which said plea is in the words and figures following, to wit:

12 *Plea.*

UNITED STATES OF AMERICA, } *ss.*
NORTHERN DISTRICT OF ILLINOIS. }

In the circuit court thereof, of the March term, A. D. 1876.

JOHN HECK, WHO SUES FOR THE USE OF SAMSON G. Lane, Nathaniel J. Owens, and John Leach, *vs.* PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY Company. } Assumpsit. Demand, $10,000.00.

And the defendant, the Pittsburgh, Cincinnati and St. Louis Railway Company, by E. Walker, its attorney, comes and defends the wrong and injury when, &c., and says that it did not promise in manner and form as the plaintiff has above thereof complained against it; and of this said defendant puts itself upon the country, &c.

E. WALKER,
Atty. for said Deft.

And the plaintiff doeth the like.

O. B. SANSUM,
Atty. for Plf.

Endorsed: Filed March 8, 1876. W. H. Bradley, clk.

13 Afterwards, to wit, on the 24th day of November, A. D. 1876, at the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN HECK, WHO SUES FOR THE USE OF SAMSON G. Lane, Nathaniel J. Owens, and John Leach, *vs.* PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY Company. } Assumpsit.

Now come the parties by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit: Oscar S. Sammis, S. E. Bradley, Thomas A. Scott, H. A. Wynkoop, Thomas J. Clark, A. G. Bower, W. L. Church, N. S. Carrington, W. P. Dickinson, Walter R. Cornell, S. S. Crocker, and J. F. Chesney, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 25th day of November, A. D. 1876, at the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

14 JOHN HECK, WHO SUES, &C., *vs.* PITTSBURGH, CINCINNATI AND ST. LOUIS Railway Company. } Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until Monday morning.

Afterwards, to wit, on the 27th day of November, A. D. 1876, at said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN HECK, WHO SUES, &C., *vs.* PITTSBURGH, CINCINNATI AND ST. LOUIS Railway Company. } Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence, and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

15 Afterwards, to wit, on the 28th day of November, A. D. 1876, at said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN HECK, WHO SUES &C.,
vs.
PITTSBURGH, CINCINNATI AND ST. LOUIS Railway Company. } Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding arguments of counsel, and receiving the instructions of the court, the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit: We, the jury, find the issue for the plaintiff, and assess his damages to the sum of ten thousand one hundred and forty dollars and four cents.

And thereupon the defendant by its attorney moves the court for a new trial herein.

16 Afterwards, to wit, on the 16th day of December, A. D. 1876, said defendant by its attorney filed in said clerk's office its motion to set aside the verdict and for a new trial in said entitled cause, which said motion is in the words and figures following, to wit:

Motion to set aside verdict and for a new trial.

In the Circuit Court of the United States for the Northern District of Illinois.

JOHN HECK, FOR USE OF SAMUEL G. LANE ET AL.,
vs.
PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY Company. } Assumpsit.

And now comes the defendant by its attorney as aforesaid, and moves the court to set aside the verdict and grant a new trial in this cause, and for grounds of this motion the defendant shows the court the following, to wit:

1*st.* That the court erred in charging the jury as follows, to wit:

"The plaintiff has offered evidence tending to show that substantially such a contract as he claims was made. This evidence tends to show in the first instance, and, perhaps, that may
17 not be considered as a disputed proposition in the case, that in the fall of 1868, a contract was made between the plaintiff and the defendant, by which the plaintiff was to cut and deliver upon defendant's line of railroad near Kokomo, the wood

"from a certain tract of land, which it was estimated would amount "to somewhere from ten to twelve thousand cords, and that the "defendant was to measure—take up as the witnesses express it— "the wood and pay for it during the year 1869. And plaintiff did "so deliver said wood, and the defendant did measure and accept "it during the year, and pay for it substantially.

"This contract is of no importance to the case further than it is "referred to, as the standard for the subsequent contract, which the "plaintiff alleges was made between the parties, in reference to the "lot of wood in controversy, so far as the contract of 1869, that is "the one made in 1869 for the wood which was to be delivered in "1870: the wood in controversy referred back to the previous con- "tract for its terms, just so far that contract becomes material to "your consideration, and no further, as there is no controversy "about the performance of that contract."

When as the defendant respectfully shows there was evi-
18 dence tending to show, and did show, that under the contract of the fall of 1868, the defendant did not undertake to measure and receive from the plaintiff from ten to twelve thousand cords of wood and to pay for the same during the year 1869; but, on the contrary, that under said contract the defendant was only required to receive so much of said wood from time to time as its necessities required, and to pay for the quantity so received the month following its measurement. That the defendant never undertook to receive nor to pay for the whole amount of said wood within the year of 1869.

2*d*. That the court erroneously charged the jury as follows, to wit:

"If that insurance was obtained by a false or wrongful statement "of Mr. Heck's interest in the wood, or if he recovered before the "court where he brought suit upon these policies, upon a misappre- "hension of his rights; or, in other words, if the court before whom "these insurance cases were brought and tried, committed error "on the trial of these cases, and gave the plaintiff a judgment to "which he was not entitled, this court and the jury has nothing to "do with that transaction, nor have you anything to do with the

"amount which was collected by virtue of that insurance, as
19 "the defendant was a stranger to the insurance transaction,

"not having paid the premium nor requested the plaintiff to "obtain the insurance, the defendant cannot now avail itself of the "benefit of whatever the plaintiff recovered under these insurance "policies. That is a matter resting entirely between the insurance "company and the plaintiff, and with which the defendant has noth- "ing to do."

The defendant respectfully submits that it was competent and proper for the jury to take into consideration the amount of money received from the insurance company, on account of the loss of the wood in controversy, in estimating the plaintiff's damages.

3*rd*. For that the court erroneously charged the jury as follows, to wit:

"The testimony in the case has established, or tends to establish, "perhaps, a contract, or three different phases of a contract, by "which the plaintiff was to deliver the quantity of wood alluded to "upon the line of defendant's railroad near Kokomo, and be paid "for the same at the price stipulated by or during the year 1870. "The second phase, perhaps, is that the plaintiff agreed to deliver "the wood upon the line, and the defendant was from time to "time to accept and measure the wood, and from the time that it
"was measured and accepted it was to become the prop-
20 "erty of the defendant, and the defendant pay for it.

"The third phase, perhaps, is that the wood was to be delivered "upon the defendant's line during the year 1870, and was to be "measured—that that was the agreement, as it is set out in the "first count, and accepted and paid for during the year 1870, and "the defendant requested the plaintiff not to insist upon the meas- "urement during that year, but to let it run along and allow the "defendant to take it up at such times afterwards as would suit "the defendant's convenience, thereby waiving the provisions of "the contract as at first made and allowing the defendant time— "further time—in which to measure and accept the wood, and "during the time that the measurement of the wood was delayed "at the defendant's own risk, the fire occurred and the wood was "destroyed.

"You may take, perhaps, substantially this to illustrate: Sup- "pose that a man, being a farmer, should contract with a merchant "to sell him his wool at a given price, to be delivered by a given "day, say the first day of June, and on the first day of June the
"farmer, with his load of wool, should go to the merchant's
21 "warehouse and say to him 'Here is the wool; I propose
"to deliver it to you and I want my money,' and the mer- "chant should say to him 'Well, unload your wool, leave it here "in the warehouse, and to-morrow morning we will weigh it and "I will pay you for it,' and if, after the wool was unloaded and "put into the warehouse and before it was weighed, the warehouse "and contents should be destroyed, the question would then be, "would that be a delivery to charge the merchant with the price "of the wool; that is, was it in substance a substantial performance "on the part of the farmer of the contract which he had made?

"I say the testimony in this case tends to prove, perhaps, either "of these phases of this contract, and it is for you to say whether "either of these *are* proven, and, if so, which; or whether the tes- "timony tends to prove still another, and that which is insisted "upon by the defendant.

"I then say to you as a matter of law, that if you are satisfied "from the evidence that it was agreed between the plaintiff, Mr. "Heck, and the defendant that the plaintiff should, during the

"year 1870, cut and deliver upon the defendant's line of railroad,
"at points to be designated by the defendant's agent in that
22 "behalf, a quantity of from ten to twelve thousand cords of
"firewood, and that the defendants agreed to receive and
"measure the wood and pay for the same at the rate of $2.40 per
"cord during the year 1870: if you are also satisfied from the evi-
"dence that the plaintiff did cut and deliver said wood upon the
"line of said railroad, according to the terms of his contract, then
"the defendant became liable to pay for the said wood at the con-
"tract price during the year 1870. And if you find from the evi-
"dence that the defendant has failed to pay for any part of the
"said wood so delivered after being requested so to do, the de-
"fendant is liable for the contract price with interest thereon from
"the time the said wood should have been paid for; that is, the
"defendant would have the whole of the year 1870 in which to
"measure the wood, and interest would not begin to run until after
"say thirty or sixty days from the first of January, 1871."

Whereas there is no evidence tending to show a contract designated in said charge "the third phase," and the court especially erred in charging the jury as a matter of law, if they believed from the evidence (in substance) that it was agreed between the parties
that plaintiff should cut and deliver upon the defendant's
23 line of road during the year 1870 from ten to twelve thou-
sand cords of wood, and that the defendant agreed to receive, measure, and pay for said wood during the year of 1870, at the rate of $2.40 per cord; that the plaintiff had performed his part of the contract, and that the defendant had failed to pay for the wood so placed upon the line of road ready for measurement, that "then the defendant is liable for the contract price of wood, "with interest from the time the said wood should have been "paid for."

That such is not the rule of law touching the measure of damages for defendant's alleged breach of contract.

4*th*. For that the court further erroneously charged the jury as follows, to wit:

"If you are satisfied that by the terms of the agreement the said "wood was to be paid for by the defendant within not to exceed "thirty or sixty days from the time it was measured, and if you are "satisfied from the evidence that the plaintiff agreed with the de-"fendant to cut said wood, and haul and pile the same upon the "line of the defendant's railroad, near Kokomo, and that the de-"fendant agreed to measure and accept said wood from time to
"time, as the same was made ready on said line, and to so
24 "measure and pay for said wood at the rate mentioned, dur-
"ing the year 1870, and that the plaintiff did get out said "wood, pursuant to the said contract, and have the same ready for "measurement during the year 1870, and that the defendant, know-"ing through its proper agent that said wood was so ready on the

"line, requested the plaintiff to delay his demand that said *would*
"should be measured and paid for within a year, and that the plain-
"tiff should not insist upon a strict performance of the terms of the
"contract as to the time of measurement and payment, and that
"while the said measurement and payment were both so postponed
"and delayed by and at the request of the defendant, the portion of
"wood now in controversy was burned on the line of defendant's
"railroad, without the fault of the plaintiff, then the defendant is
"liable for the contract price of the said wood, and interest thereon
"from the time the same was burned."

And the defendant respectfully shows that said charge does not correctly state the rule of measure of damages.

That under said supposed breach of contract the plaintiff could only recover his actual damages, instead of the contract price with interest.

25 *5th.* That the court erroneously charged the jury as follows, to wit:

"If you are satisfied from the evidence that it was agreed be-
"tween the plaintiff and the defendant that the plaintiff should, dur-
"ing the year 1870, cut and haul upon the defendant's line of railroad
"a quantity of say from ten to twelve thousand cords of firewood,
"which the defendant was to accept and measure from time to time
"during the said year 1870, as the same should be hauled, piled,
"and made ready, and pay for the same at the rate of $2.40 per
"cord; and if you are further satisfied from the evidence that the
"plaintiff did, during the year 1870, cut, haul, pile, and make ready
"said quantity of wood, according to the said agreement, and re-
"quire the defendant to measure and pay for the same according
"to the terms of the said agreement, and that the defendant refused
"to measure and pay for the said wood when requested so to do,
"after the same was so cut, hauled, piled, and ready for delivery,
"then the plaintiff is entitled to recover as damages in this action
"the difference between the contract price of $2.40 per cord and
"the price at which he could have sold said wood to others at said
"place. And the jury must determine from the evidence
26 "whether the said wood had any value at the place where it
"lay on the line of the defendant's railroad, except to sell to
"the defendant.

"If you are satisfied from the proof that the said wood could
"not have been sold except to the defendant, then the contract price
"and interest from the time the defendant made default will be the
"measure of damages."

Which said charge virtually excluded from the consideration of the jury the evidence that various parties in the immediate locality of the wood were purchasing wood for the purpose of selling the same to the defendant; and excluding from their consideration the evidence of market and market-value furnished by the defendant.

6th. For that the court erred in the form of verdict given the jury.

7th. The court admitted on the trial improper evidence on the part of the plaintiff, that is to say, the court permitted, over the objection of the defendant, the plaintiff's counsel, during his closing argument to the jury, to read to the jury as evidence the following part of what the counsel for plaintiff claimed to be a copy of evidence given by the plaintiff upon the trial of the case of the said plaintiff against the said defendant at Howard county, Indiana, to wit:

27 "That I would furnish to the railroad company wood at "the old place; he asked me how much I would get out and "I told him about the same quantity as I had got out last year; "from ten to twelve thousand cords I said I would get out, and "then asked him about the pay for it, and he said that they would "pay the same price that they had paid to me the previous year, "and that they would measure it up and pay for it in the same way "as they had done the previous year.

* * * * * * *

"Before that time I had directed Mr. Lane to see Mr. Rudolph "and inquire of him what Mr. Caldwell had said to him about the "wood.

"Q. Mr. Rudolph agreed with you to take the wood up as they "had taken it up during the year previous?

"A. I didn't have land at that time to cut the wood from, and "after he made that agreement with me I bought some land and "sent down men, and had most of the wood cut during the winter.

* * * * * * *

"Got out ten or eleven thousand cords, expecting they would "take it up as they had taken it up the year previous. Mr. Ru-"dolph stated to me that the railroad company would take it up "within the year 1870.

"I went to Logansport in 1871, and saw Mr. Caldwell, and

28 "spoke to him of their failure to take the wood, as they had agreed "to do. He said to me, we have got to take up only a portion of "it, that they were acting under restrictions. Mr. Caldwell was general "agent, and so forth. I spoke to Mr. Caldwell at that time about "the fixed agreement to take up the wood, and said to him that "they agreed to take it up; we didn't agree when we would pay "for it. I told him I thought when nothing was said about the "time of payment that it meant a cash payment. He told me, we "will give you a fair division. I told him then that Mr. Rudolph "had agreed with me to take the wood at the price paid me in "1869, and would measure it up as he had measured up the wood "bought of me in that year. I told him Mr. Rudolph had said to "me in 1869, 'When you get a thousand cords or so let me know, "and I will measure it up.' The first time I saw Mr. Caldwell

"about it was at Logansport; it was in the fall of 1870. I said to "him, the company was not taking up the wood as fast as I ex- "pected it would do, and that I had come to see him about it. I "then stated over to him the bargain that I had made with Mr. "Rudolph, and the way I had been delayed by the company, and "Mr. Caldwell then said to me, I will do the best I can for
29 "you, and give you the back measurement next month."

To the reading of all the foregoing as evidence the defendant at the time properly excepted.

8th. The verdict of the jury is contrary to law and not sustained by the evidence.

9th. The damages are excessive.

PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY CO.,
By E. WALKER, *its Attorney.*

(Endorsed:) Rec'd Dec. 16, 1876. Wm. H. Bradley, clk.

On the same day, to wit, the 16th day of December, A. D. 1876, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN HECK, WHO SUES FOR THE USE OF SAMSON G. Lane, Nathaniel J. Owens, and John Leach, *vs.* PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY Company. } Assumpsit.

30 The motion of the defendant for a new trial of this cause heretofore entered herein, now coming on to be heard, now comes the plaintiff, by his attorneys, and enters a remittitur of one hundred and forty dollars and five cents upon the verdict herein, and the defendant and its attorney failing to appear, the court overrules said motion. And now comes the defendant, by its attorney, and moves the court in arrest of judgment, and the court being now fully advised upon said motion in arrest, overrules the same.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of ten thousand dollars, his damages so as aforesaid assessed, less the remittitur aforesaid, together with his costs and charges in this behalf expended, amounting to the sum of forty-two dollars and seventy cents, and that he have execution therefor.

And on the same day, to wit, the 16th day of December, A. D. 1876, on the hearing of said cause, the following exceptions were taken and allowed by the court, and made of record in said entitled cause, to wit:

31 In the Circuit Court of the United States for the Northern District of Illinois.

JOHN HECK, WHO SUES FOR USE, &C., *vs.* P. C. AND St. L. RY. CO. } Bill of exceptions.

Plaintiff's Evidence.

John Heck (sworn). Know Mr. D. A. Rudolph. Met him some time in October, 1868, as defendant's wood agent. Told him we were not ready to make contract yet with him. Had not made purchase of land yet. Asked him his price. He said $2.25. Said he would take from 10,000 to 12,000 cords if it could be got out in a certain time. I finally agreed with Mr. Rudolph for $2.40 per cord. Was to get out from ten to twelve thousand cords in the course of the ensuing summer. This was perhaps in December, 1868. It was to be delivered in the course of the ensuing summer. Rudolph said: "I will measure it most any "time you want. Whenever you get out a lot of two or three "thousand cords we will measure it out, and you send in your "voucher, and you will get your pay for it the next month." It was to be taken up in the course of the ensuing summer. It was in the fall of 1868. It was all to be delivered in year 1869. The bargain was it should all be delivered in that season and it should be all taken up in that season and paid for within thirty days. It was all performed according to contract, except
32 once or twice they did not measure every month. Saw Rudolph again in fall of 1869. He came down to see me where we were chopping. Told him I had bought more land and would probably give him same quantity I had last year. Said he would give me same price and pay for it in same way, and take up and measure in same way. Saw a great deal of wood being gotten out there by other parties. Was fearful there might be some trouble at headquarters about the wood. Rudolph told me he was going to Columbus. Told him I would like to go along with him to talk the matter over. Went as far as Logansport and told Mr. Rudolph if he reported the thing to Mr. Caldwell I would be satisfied, if Mr. Caldwell understood it. He was general superintendent. I think Rudolph said they had never gone back on his bargains. In meantime I left word with Mr. Lane to see Mr. Rudolph when he returned and ascertain whether it was all right and satisfactory. Mr. Lane was my book-keeper, foreman, and superintendent of the work at that place. Rudolph knew him to be my agent there. Did not see Rudolph again for 2 or 3 days. In the meantime we were getting out wood all the while. This was perhaps the last of January. When I saw Rudolph he said it was all right. The fact is I did not doubt but that it was all right. Had heard nothing to the contrary. Got about eleven thousand cords cut during the

winter. It was to be delivered on the line of the road, on the property owned by the railroad company, within 5 or 6 feet of the track. Mr. Rudolph indicated where it should be put. It was all placed along the side of the track, where Rudolph directed us to put it, and we frequently called on the agent to come and measure and receive it. I think it was all delivered in the fall of
33 1870. Think the company only took up about three or four thousand cords during year 1870. They would come and measure off a few banks, take it away, and it would be sometimes two and sometimes three months before they would come again. The preceding year they took it all along very regularly. They took whenever and wherever they pleased. Talked to Rudolph every time I met him about taking up the wood. Urged upon him that it was a great expense laying out of the money—danger of fire from the engines. We were keeping men to watch it and dug wells to protect it. Told Lane he had better get insurance on it. Saw Mr. Caldwell and told him the arrangements I had made and they were not taking the wood up. He said he did not know much about it, as Mr. Rudolph had the management of it then. I asked him the cause of the delay and said he ought to take it up as he agreed. He said if they had agreed to take it they had not agreed when they would pay for it. I told him when I agreed to sell it it was to be a cash purchase. Told Rudolph several times we would sue the company. Wood all burned up but about 1,200 cords. They measured this and took it. There was about 3,000 cords burned. This was a heavily timbered country. Every man about there had more timber than he wanted. They would give you timber. Glad to have the ground cleared off. Might have peddled a little around Kokomo. Large quantities almost worthless.

Cross-examination:

Have no interest now in this case. Parted with it when I received my judgment against the insurance companies. Have been examined 2 or 3 times as a witness. Was examined as a witness on the trial at Kokomo, and my deposition was taken pre-
34 vious to that trial. When my deposition was taken, I stated substantially the contract between Rudolph and myself for the last lot of wood. January 27, 1870, sold Lane and Owens my interest in the wood. I agreed to have all the wood cut and delivered on the road by sometime in September or October, and the most of it would be cut in the winter. Did not agree to cut any given amount during that winter of 1868-9. The most of it was to be cut. I had until the fall of 1869 to complete it. Asked Rudolph when he would be ready to measure and receive it; he said he would measure it most any time. It was in forepart of December, 1869, that I had first conversation with Rudolph relative to getting out wood for the coming season. There was some of the wood cut in 1869, before the second contract was made. Should

think half or two-thirds of this wood, under the second contract, was put on the line in the winter months of 1869 and 1870. I saw Rudolph about every month, and sometimes oftener, and sometimes when I was down there, every week, during the winter of 1869 and 1870; and urged him every time I saw him to take up the wood faster. Think he only measured once through the winter. At the conversation in December, Rudolph said he would take it up as he had done the year before. Do not think he took it up faster than the company wanted it under first contract. The company did not want to pay for so much at a time. I went to Columbus in November, 1870. Caldwell, the general superintendent of defendant, then said he would give me a fair proportion. I said if he would give me a fair proportion beginning back in the start, I would be satisfied. I said if a man has only one thousand cords you
35 take his all up. And I have ten thousand, and you leave mine ten months or ten years, before you take it all. I know I offered to extend the time of payment, and an abatement of some money if he would close it up. In March, 1871, I instructed Mr. Lane to take out three policies of insurance on this wood that was burned, of $2,000 each. They were in my possession. Took out policies for 3 months, expecting company to take up the wood. At end of three months renewed them again for thirty days, and 7 or 8 days before policies expired, the wood was burned. As the company took up the wood a deduction was to be made from the amount insured. Think it was described as my wood in the policy. I insured my insurable interest. I don't know what the policies might describe. The company that insured it understood precisely how the wood stood. Brought suit against the insurance companies, and think I stated on that trial, as a witness, that I had an insurable interest in the wood. I stated the circumstances and the facts. There was an explanation made at the time, I think it was called my wood, and the explanation was made before the judge. The opposite parties claimed I had no interest in it. It belonged to the railroad. I had sold it to them—and it was decided I had an insurable interest in it. It was explained that way at the time. Think very likely I said it was my word. The Andes paid $2,000, and the Home $2,000, and the North American about $900.00. I employed a man in the summer of 1871, and while the wood was on the line of road, to watch the wood. He was employed all the time I had it insured. I only insured for $2.00 per cord. In 1870 there was no watchman—there was in 1871. We dug wells that year and year before, for water to protect the wood from
36 fire. Expenses of watchman and digging wells were paid by me. I did not expect to get my pay for the wood until it was measured by the company. I had a claim against the company for the wood, as soon as it was placed along the line of the road. If they did not take it up or measure it in the proper time to measure it, I had a right to prosecute them for it. The wood was

got there for the company, and they were liable for it. Considered it my property, got there for the company, and put where they told me to take it. It was my property as I understood it. It was a breach of contract on the part of the company, in not taking the wood, as I considered it. That's what I think I sued the insurance company for the value of the wood destroyed, because it was my wood that was destroyed and I swore it was my wood, because I believed it was my wood, at the time of the fire. It was not worth a great deal if the company did not take it. I made inquiries in Chicago, but found that common railroad wood would not suit. They wanted body wood. Part of this was body wood. Perhaps half of it, I believe. I only inquired of one person. Don't believe I made any inquiries to see whether I could sell it any other place. I saw no chance. In month following fire, (November,) company sent agent to measure balance of wood.

On trial against Home Insurance Company I testified that it was my wood.

Samson G. Lane (sworn). Live at Kokomo, Indiana. Was in employment of Mr. Heck in getting out wood and ties for
37 him in 1868 and 1869. Know Rudolph since fall of 1868.

I know about contract styled second contract, by Heck—that of 1869. He began getting out wood on that in forepart of Jan'y, 1870. Might have been a small quantity cut in Dec., 1869. Got out 10,841 cords. Began to haul 3rd or 5th of Jan'y, 1870. Bulk of wood was hauled by middle of September, 1870. Probably 200 or 300 cords hauled afterwards. 9,800 cords were hauled and balance Mr. Heck bought on the line of road. Wood was delivered at points indicated by Mr. Randolph on the line of defendant's railway, pursuant to his instructions. The company took over 3,000 cords of this wood in 1870. The company took up wood four times, I think without my being there. In the fall of 1870 there were 3,174½ cords taken up. In the fall of 1870 there were about 20 cords of this very wood that had been hauled out under the agreement, whatever it was, of 1869, destroyed by fire. Rudolph measured over the ground where it stood and it was paid for. Was present in September, 1868, when Heck and Rudolph talked about contract. Heck proposed to furnish to the company a certain amount of wood to be gotten off a track of land, purchased by him before that, estimated at from 10,000 to 12,000 cords. We were to get it out as fast as possible in the winter and spring, and have it hauled on the line of the road. Rudolph agreed that they would take it up about as fast as it was gotten out; that is, they would measure it and pay for it within a month after it was measured; they would take it up from time to time, as Mr. Heck should get it out, in quantities sufficient to measure, and they would pay $2.40 per cord for it. It was all to be gotten out during 1869. I met Mr.
38 Rudolph about 10th or 15th of January, 1870, on behalf of

Mr. Heck, as to wood contract of that year. Rudolph said "it was all right." Mr. Caldwell says, we will take from Mr. Heck from 10,000 to 12,000 cords. About the quantity we got out the preceding year. And they would take it from time to time, take it all up during the year, and pay for it at the rate of $2.40 per cord, for what he may have cut; but for any portion he might purchase of others he would only pay $2.25 for. Wood was not all taken up in 1870. A portion of it was taken up in 1871. A portion was burned. My measurement made 3,100 cords burned. Mr. Rudolph made 3,153 cords burned. I measured before it was burned. He measured after. To protect from fire the railroad company, where the wood was 5 or 6 ricks deep, measured a distance of about 100 feet,—cut through took it out, so as to make a parting or division in the long ricks. They made 3 or 4 of these separations. They took the wood off in their trains. I obtained the insurance by Mr. Heck's directions. In April, 1871, went to Mr. Russell, insurance agent and banker at Kokomo, and stated that Mr. Heck had made a contract with the railroad company for a large quantity of wood, a portion of which they had measured and paid for, but a large quantity yet remained unmeasured and he thought best to have it insured. He insured some 6,500 or 7,000 cords at $2.00 per cord. Policy was for 3 months, at expiration of which took out another policy, renewed for 3 months more, and in October a new policy was written covering a less quantity of wood. Mr. Russell insisted at that time that a watchman should be kept to put out fires. I agreed with him that it should be done, and that was entered in the policy.

39 The railroad company had their men looking out for fire all the time. It was very dry around there. Don't think the wood had any market value, January 1, 1871, except to railroad company.

Cross-examination:

The contract of 1868 and 1869 was, that company should take the wood up about as fast as Mr. Heck should get it out. And what was measured one month they would pay for the next.

Mr. Rudolph gave Mr. Heck to understand, in my presence, that they would measure it fast enough for him; that is, that they were very anxious for it, and could measure it as fast as he would get it out.

My opinion is that there was no market for this wood except to the railroad company, with the exception of a few hundred cords. Do not know of Mr. Leeds, at Kokomo, buying wood and holding it. Do not know of Mr. Davis, of Galveston, buying wood. Never made any inquiry, nor attempted to sell it to anybody else. No part of the wood burned was wood that had been bought by Mr. Heck along the line of the road.

M. J. Owens (sworn). Live at Kokomo, Howard county. Know Hr. Heck and Mr. Rudolph. There was no market value for wood

after the first of January, 1871, except to the railroad company. There were men buying wood down there from Davis and Co. that bought a little wood from some of the farmers on speculation. I don't know whethey they would have bought our wood. They were buying small quantities. They were buying it to sell to the
40 railroad company. I suppose they had it piled along the line of the road, and Mr. Rudolph afterwards took it up. There was some demand in our town of Kokomo for wood. I never paid more than two dollars for wood delivered at the brick-yard. I burn from four to six hundred cords, and another brick-yard that burns two or three hundred cords. It would have cost to deliver that wood all it was worth and more.

Cross-examination:

I am one of the plaintiffs in this suit. Am interested in the result of it, of course. Whatever is recovered is to be divided between me, Mr. Lane, and my former partner, but that is a matter between him and me. Mr. Heck has no interest. He has realized whatever interest he did have; that is my understanding. I don't know why Mr. Heck prosecuted this suit in my county in his own name, and not in mine and Lane's. The first time I commenced hauling the wood out for Mr. Heck in January. I think I finished it about the first of October; it may have been a little earlier than that. Mr. Rudolph showed me where to pile it. When I went down there on the 29th of January there was some hundred cords piled under that contract on Mr. Heck's ground. That was before I commenced hauling. This was merchantable wood down there. It is my understanding that Mr. Heck bought 1,200 cords of wood down there from other parties, and other parties sold to Davis and Co. I don't know how much. The market was glutted—everybody had wood along the road and nobody wanted it. Didn't attempt to find out what the value of this wood was. Was simply holding for the railroad company until they got ready to take it up.
41 Never attempted to sell to any other person. I presume that in the trial at Chicago between John Heck and the Home Insurance Company the question was put to me, "Do you know who owned that wood?" and that I answered, "yes, sir," and said "John Hock," and that I answered that John Heck's money paid for the cutting of it, and that his money paid for the hauling of it.

Defendant's Testimony.

D. A. Rudolph (sworn).

Name is D. A. Rudolph, jr. 1869 and 1870 was company's fuel agent. Mr. Heck said he was ready to make a contract, and we made an agreement of that kind. The agreement was that we were to take up the wood that was cut on 320 acres, I think at $2.25 a cord. The wood was to be cut in 1869 and delivered along the line of the road. There was no contract as to the amount that

should be delivered at any particular time or the amount that I should measure at any particular time. I asked him how much wood,—how soon he would cut it or deliver it and put it out on the road. He said he did not know, it was getting pretty late in the season, and he would have to hunt up some men;—but he said he would cut it and haul it out as soon as he could—outside men that would take a contract of that kind. This conversation occurred in the latter part of December, 1868; didn't see him again for some time. He went off and prepared to gather up men to cut wood and put it on the road. Saw him in January, I think. He said then that nothing had been said particularly as to when this wood would be paid for, when it would be taken up, and I told
42 him we would take up the wood as fast as we could use it, and perhaps as fast as he could get it out, and would pay for it within 30 or 60 days from the time I measured it. I told him I presumed we would take it up about as fast as he got it out. He went to work cutting and hauling, and I measured along during the summer, and I think that during that year I measured up all the wood that was cut on that piece of land. The price of this wood was changed, I think, subsequent to January, 1869, either in the latter part of the winter or early in the spring, perhaps the latter part of January or maybe the first part of February, on account of the very wet winter, difficulty in hauling it out, and finding men to haul the wood. Mr. Heck said he would have to stop hauling unless he could get an advance of ten or fifteen cents on the price agreed upon. Asked me if I would not see my folks; see what I could do towards having the price advanced. I consulted our general superintendent and also Mr. Converse. They agreed that I should advance the price to $2.40 a cord. Saw Mr. Heck and reported what instructions I had. Reported his wood afterwards at $2.40 a cord. Said he had to pay more for hauling, and he would have to stop unless the price was advanced. During the spring and summer of 1869 I had interviews with Mr. Heck relative to the measurement of this wood, and my measurements were satisfactory. At these measurements either Mr. Heck or Mr. Lane, or some one representing him, were present. They seemed to be satisfied with the payment for the wood—no objections made that I know of. I think the hauling was done continuously during each
43 month until the contract was completed after they had commenced. I had no fixed time for measurements; measured when it best suited the interests of the company to do so. The interest that controlled me was consumption. I was controlled entirely by the consumption of wood by our engines. Some months we use more and some months we use less. Used wood-burners altogether. Prepared our wood on the line of the road between Richmond and Logansport, on this line of railroad. We had certain stations that trains could stop at, or localities for the wood. I had an idea what we would use the succeeding month by what we

had used the month previous. I first consulted the interests of the company in my measurements of wood and taking it up, but I took more wood than what the company really needed. When I did so, I did it at the solicitation of Mr. Heck, to help him, and also treated the other the same way. My instructions in 1869 were to purchase wood at the localities that suited the interests of the company, or where we needed wood, and in such quantities as we needed for the immediate use of the company. We had our regular wood stations, and purchased about so many cords at each station on the line of the road. My instructions were not to carry a heavy supply of wood, nor more than was really necessary for the use of the company. In other words, if it took ten thousand cords on the whole line of road to keep things going, my instructions were not to increase that quantity, not to increase the stock on hand, but to keep the amount or stock as low as possible, to keep the company sufficiently supplied. That policy was pursued towards Mr. Heck during the summer of 1870. I think I did better by him than I did by some others. There was no contract made between Mr. Heck and me
44 in the fall of 1869, relative to the wood that should be put out on the line during the year 1870. During the fall of 1869 Mr. Heck was anxious to continue cutting and putting out wood, at this same place, or in the neighborhood, and we had several conversations as to what the company would want in the future, or fall of 1870, and he wanted to know if he could not get a contract to deliver wood in 1870. I told him we seemed to have pretty plenty of wood in hand, and I didn't have the power to make a contract; referred him to Mr. Caldwell; told him he was our general superintendent, and had the charge or the management. I told him I would go to Columbus with him. We went over once—it was just before Christmas in 1869, or the second day of January, 1870. Mr. Caldwell gave me no satisfaction with reference to the contract, nor what I should say to Mr. Heck. Saw Mr. Heck after that. Told him what Mr. Caldwell had said to me. Well, said Mr. Heck, "I suppose it will be all right if I go on and get out wood." My answer to him was about in these words: "As long as we operate the railroad we shall want wood." Nothing said as to the quantity he should deliver; didn't tell him he should deliver it, or anything of the kind. He told me he wanted to get out about the same amount of wood in 1870 that he did in 1869. Mr. Heck asked me if there had been any change in the price of wood. I told him I had no instructions to change the price. Nothing was said at that interview as to measurement or receiving it; have no recollection of his referring to my manner of measuring or receiving wood in 1868 or 1869. Had no contract with him
45 in 1868 to receive any certain amount in any one month. Didn't agree with him to receive all the wood he should put out during any one year, or as soon as he put it out. Nor to pay for it within 30 or 60 days; nor did I attempt to measure it as fast

as he put it out, and send my returns into the company so that the bills could be paid within 30 or 60 days from the time that I measured it. I favored him all I could in the estimate of his wood in 1869; favored him in 1870 and 1871, all I could. I took more than his relative proportion of wood on the line of road in 1870 and 1871; didn't take up wood on the line of road as fast as it was put out during 1870 and 1871, because the amount that was delivered or hauled out was much greater than the demand. I could not do it. Pursued the same course as to the measurement of Mr. Heck's wood, under the contract of 1870, as I did in 1869; that is, took what the company could use, and what the company required from time to time. The company didn't consume as much wood in 1870 on that division of the road as it did in 1869. The decrease in consumption arose from the decrease in business, and from the use of less locomotives on that part of the division. Our business was not as heavy in 1870 and 1871 as it was in 1869. As a matter of fact, neither Mr. Heck's wood, under either contract, or anybody else's wood, on the line of road was taken up by the company, and used, until after it had been measured and marked as accepted by me.

There were people during the fall and winter of 1870 and 1871, in that locality, engaged in buying wood of different parties on the line, and selling it to the railroad company: Leeds & Co., Davis & Co., and Davis Bros. That was at Kokomo, about 2½ or 3
46 miles at the farthest point from this wood of Mr. Heck's. Charley Mosher was buying wood at Galveston; probably three or four parties at Galveston buying wood, and farmers would sometimes put out several hundred cords of wood; sell it to the dry-goods men, and young men, buy goods with it, and then these would transfer it to the wholesale men; made large amounts payable to Hicks, Eliot, and Shaw of Logansport; Sweet, Dempster & Co., of Chicago, and other men that came up here and bought of wholesale men; it was a kind of currency for them. In my opinion, in the fall of '70 and '71 three thousand cords of that wood could have been sold in that neighborhood and that market to other parties. I could have found purchasers. There were parties buying wood along the line of road, and holding it until the company would purchase and pay for it. In 1869 we were short of wood at this point, and also between this point and Logansport, and we shipped large quantities from the south end of the road to this end to supply this part of the line, and we shipped also to what we call the State Line. That is a line we have from Logansport west to Peoria. In the winter of 1869 and 1870 there was wood prepared west of Logansport, on both of these lines, but in 1868 and 1869, the winter of 1868 and spring of 1869, there was none. We were short of wood at that time on those lines. After we had a sufficient supply west of Logansport, ceased to ship from Heck's wood, and further south to this point. We commenced to change from wood-

burning to coal-burning engines between Logansport and Chicago in the fall of 1869, and continued to change our engines, and used coal-burners between Logansport and Chicago, and between
47 Logansport and the State Line, on account of the shortness of wood and the prairie country we had to run over; that decreased consumption of wood to a considerable amount on these divisions. The wood that was put out under Heck's contract of 1868 and 1869 was removed to other points on the road by train. We bought from other parties between Kokomo and Galveston besides Mr. Heck in the fall of 1869. Followed precisely the same course in 1869 and '70, that I did in 1868 and '69; the same rule governed me in the measurement of Mr. Heck's wood that governed me in the measurement of all other parties, except that I think I favored Mr. Heck more than anybody else.

Cross-examination:

My business at the present time is claim agent of the road. I am in the employ of the same corporation that is defendant here. Have been in such employ ever since it took possession of this road. Prior to the lease I was in the employ of the corporation which preceded that. Had no authority to make contracts for wood for the Columbus, Chicago and Indiana Central Railway Co., except as to the one instance in which that power was delegated to me; that was this contract that Dr. Converse authorized me to make with Mr. Heck in 1868 and 1869. That was only partially made by me, partly by Dr. Converse, my superior. He laid the foundation and then told me what to do to close the contract. I was not present at all times with Mr. Heck and Dr. Converse, and only knew of the contract in 1869 what I learned from these two men. I don't think there was any times that they had conversations, nor any arrangement between them that I don't know anything about.
48 Dr. Converse remained as division superintendent after the road passed under the control of the present defendant probably two or three months. The present defendant took possession of the road March 13th, 1869. My first conversation with Mr. Heck was in October, 1868, and was either on the land with him at that time or a short time afterwards. He wanted me to look at the timber. I had no business there myself. After he bought the land he came to me at Logansport and said he was ready to make a contract. Doctor Converse was not present at that time. It was about the close of the year or the commencement of the year 1869. I cannot tell the dates. Rather think it was in December. Doctor Converse told me to make a contract with him at $2.25 a cord. Heck was not present when Doctor Converse told me this.

After Mr. Heck bought these 320 acres of land in 1869 the agreement was, we were to take all the wood there was on that piece of land. There was an approximate estimate made. We guessed that

the timbered land would cut so many cords to the acre, and so many acres would make so many cords of wood. The understanding was that we were to take from him the wood that was on the 320 acres—on that tract of land. We might have estimated the amount to be from ten to twelve thousand cords. Am positive there was no agreement made that it was to be ten or twelve thousand cords, but the agreement was for whatever was on that piece of land. If it reached ten or twelve thousand cords it was to be that much. If it exceeded that it was to be what was on that land. No time fixed for the cutting of it. It was an understanding or impression that Mr. Heck would go to work right away
49 cutting, and cut and put it out as fast as he could. He expected to deliver it during the season. No time specified in which it was to be cut. My impression was it was to be cut in 1869. Mr. Heck said he would cut it and put it out as fast as he could. The amount that was to be delivered and measured each month was left open. If he could not get men to cut a thousand cords he would cut 500. If he could cut that he would put it out on the road, and we were to measure it as fast as we could and use it up as fast as we had any means of taking it away, or as fast as we could pay him for it and no faster. I think I might have said to Mr. Heck that we would take it up during 1869, or the impression was that we wanted it during the year 1869. Might have said that we would want it in 1869. From that conversation he might have understood the agreement to be that we would take it up in 1869. It is my understanding of the matter that I did tell him that we would take up the wood as fast as we could use it, and perhaps as fast as he could get it out, and we would pay for it in 30 or 60 days from the time I measured it. I don't think I measured and took up wood under that contract without any representative of Heck being present. I have no recollection of it. I measured all this wood in 1869. I sometimes favored him by taking up more wood than was necessary. Think I helped him more or as much in 1870 as I did in 1869. We were paying along the line of the road in that locality, other than for Heck's wood, $2.25 a cord and less. We paid him $2.40. We had wood on the line of the road that we could take at $2.25 when we were taking his wood at $2.40. The new organization, which went into power
March, 1869, continued on to take Mr. Heck's wood under
50 the contract made in 1868. Of course it was along the line of road. We took it, paid him under the old contract along in 1869, although the road had passed into new hands. I was simply carrying out instructions. In the year 1869 Mr. Heck and I had a conversation about the change of organization. The company paid the bills I made out. Didn't make any contract with any one for wood standing in the woods or in the tree in 1870. Didn't make any contracts for wood in 1870 and 1871 to be delivered. I was examined as a witness on the trial of the insurance

cases. I did answer to a question put me there, "We had perfect control of the wood for our own purposes after it was piled. We had a right to take any amount we wanted—not limited. If we wanted to we had the right to take it all. As soon as it was ranked we could get it and haul it off whenever we pleased." I did answer in that suit, "When we wanted to take up fifty cords of wood out of the ranks we didn't consult Mr. Heck. We took it without consulting Mr. Heck, putting a memorandum on the wood of how much we had taken."

Ithamer Russell (sworn). Reside in Kokomo, Indiana; am at present agent of the Home Insurance Company at Kokomo, and was in 1870. Application was made in 1871 by Mr. Heck for insurance on a certain quantity of wood. That application was made on the 3d of April; probably a few days before that. He told me where the wood was situated—from 2 to 3 miles northwest from Kokomo, on the P. C. & St. L. R. R., near Boardman's mill. Didn't understand anybody else had any interest in it at that time except himself. He described it to me as his property. Issued three policies at that time; prob-
51 ably a few days afterwards. Think they were delivered to Mr. Lane. Went to examine this wood. Met Mr. Lane before the issuing of the policies, and after application by Mr. Heck. Issued three policies, each for $4,553.90, for three months. At the expiration of that time other policies were issued. On the 3d of July three other policies were issued for the same amount for three months. Third of October three policies for $3,323.33 in the Home of New York, North American of New York, and Andes of Cincinnati. They were all considered good companies. Went upon the ground and made a measurement of this wood with Mr. Lane. Pointed out as the wood Mr. Heck wanted insurance on. Mr. Lane didn't refer at that time to any contract that he had with the railroad company. On the renewal, the last time, Mr. Lane came and spoke to me about the policies. I told him they expired that day, or something to that effect. He said, "I will go and see some parties that have some interest in them," or something of that kind, and said, "I will come back in a little bit." He came back and took the policies out in Mr. Heck's name. Didn't mention any interest that the railway company had in the wood then.

[Fourth clause read to the jury, as contained in the policies that were issued to Mr. Heck.]

It was in all of the policies. There was no limitation of ownership of any interest in that wood described in the policy as required by that fourth clause; no limitation of Mr. Heck's ownership.

Cross-examination:

There was nothing said about releasing the policies as the wood was taken up, at the time of issuing of these policies, until the last

policy was issued and Mr. Lane told me they had been re-
52 duced, and they were reduced accordingly. The policies covered some wood that was not burned—south of Kokomo. It was a hundred acres. We insured in our company other interests than absolute ownership. I made the entry on my book when I issued the policy, and the entry is "John Heck, on wood."

Plaintiff' Evidence in rebuttal.

John H. Hull (sworn). Live at Kokomo, Ind. Know D. A. Rudolph; he lives at Logansport; he is acting as purchasing agent of wood and ties of the P. C. & St. L. railroad, six years and over. Had a talk with him in 1870 about sale of a lot of wood. Asked him if he did not want to purchase some wood; he said, no; he said R. R. had purchased between 10 and 12 thousand cords of John Heck and that would be all they would want; all they could possibly use. That is all the conversation I had with him.

Cross-examination:

Engaged in sawing railroad ties and lumber. Mr. Rudolph said they had either contracted for or purchased ten or twelve thousand cords of Mr. Heck.

53 Counsel for defendant, by agreement of counsel, in the course of his argument to the jury, read as evidence in the case the following evidence from depositions and testimony given by the plaintiff, John Heck, upon previous examinations.

On the trial of the Home Insurance case in the winter 1872, John Heck testified as follows:

Mr. Sansum:

"Q. I call your attention to the wood which is mentioned in "these policies, (handing witness the policies—defendant's policies.) "I ask you to state whose wood it was, if you know?

"A. It was my wood."

On the taking of his deposition in Chicago in November, 1873, in the suit against the defendant railroad company, which was tried at Kokomo, Indiana, John Heck testified as follows:

"Q. Referring to the first contract of 1868, what was the sub- "stance of that contract?

"A. It was to be from ten to twelve thousand cords, which we "delivered along in the winter and the following spring, the spring "of 1869. It was delivered along during the course of the sum- "mer in 1869, and it was to be measured as we got it out. Asked "him what time he would measure, and he said most any time I "wanted; wanted it pretty badly. I asked him when they would "pay for it, he said the following month after it was measured.

* * * * * * *

"Then he asks him how it will be measured, and he answers, "about as you want it, about as it is put out. * * *

54 "Q. Well, was there anything said about the quantity to "be got out?

"A. The supposed quantity was to be from ten to twelve thousand "cords. * * *

"Q. Now what did you and Mr. Rudolph say about the new ar- "rangement?

"A. I asked him what prices he was going to give for wood again. "I told him if I got those ties for Mr. Hill, I wanted to arrange it the "same for wood; take what would do for ties and the balance put "into wood; it is not profitable to buy land to cut off only the "ties."

* * * * * * *

"I bought timbered land and cut the timber that would answer "for ties. Without having the contract to put that into wood that "would not answer for ties would be a losing job. He said we "shall want it all again; he said he would take it, and he thought "the price would be about the usual price paid last year; that he "would have to talk with the company."

* * * * * * *

"I had two or three talks with him at different times. I think "I talked with him, once, particularly, at Mr. Lane's, about the "last of December, 1869, in reference to it. I told him I didn't "wish to go on and get out this wood unless there was a certainty "of their taking it all at that price." * * *

"He said they would want it, or would take it, at about the "prices and on the same conditions he had the previous year. And "shortly after that I went to Logansport with a view of going to "Columbus to see the head of the department there, the general "agent, that there should be no misunderstanding about this matter,

"and stopped at Mr. Rudolph's all night so as to leave
55 "the next morning for Columbus. During the evening I "called on Mr. Rudolph, it came on a very cold spell of "weather; being not very well I made up my mind that I would "send down by Mr. Rudolph and let him talk with the people "there, and if they approved of it I should be satisfied. I went up "to see Mr. Rudolph, he made the remark, they never disputed any "of my contracts."

"A. Sometime, I think in January, the forepart of January as "near as I can recollect, or the latter part of December; twice I was "there; the 8th of January I was there. I was there several times "about that time. I saw him in the meantime; he said it was all "right, as we talked it up, that they would like the wood.

"Q. Now, how much wood, about how much wood?

"A. He asked me before I left home how much wood, that he "should state, that you will have and when will you have it. I "told him there would be about the same quantity as there was the "previous year; there would probably be from ten to twelve thou-

"sand cords, and we would get it out in the course of the following "season.

"Q. What season?

"A. In the year of 1870.

* * * * * * *

"Q. State substantially what occurred between you and Mr. "Caldwell at that time."

[This had reference to the first interview, the interview at Logansport.]

"A. He said he was not very well posted about my bargain "or contract or arrangement; that he didn't know I had so great "a quantity; would see next month. I will give you a big meas-"urement, Mr. Heck; we can't take it all up, we will give you a "good big measurement.

56 "A. Again, in the winter of 1871, I went to Columbus to "see Mr. Caldwell, to see if I could persuade him to take up "my wood; that if he could not pay for it I would extend the time of "payment. I didn't care so much about the time of payment as "the closing it up; he then told me I can't do that, we will give "you a fair proportion of measurement; I told him that if he "would go back and give me a fair proportion from the first year, "I should be satisfied. He had measured a good many people's "wood and hadn't measured mine at all."

* * * * * * *

Referring to the contract of 1869, he says: "This was about the "last of December, 1869; this was after they had finished the con-"tract of 1869. I told him I would furnish the wood (referring to "Kokomo) the first or third of January, and in January again; I "was afraid that Mr. Rudolph hadn't authority to buy such large "quantities of wood—such large quantities, and told him I would "go to see Mr. Caldwell with him. I was not able to go, and con-"cluded to send by Mr. Rudolph and told him to state to the com-"pany. He said the company would not go back on any of his "bargains. He said, what amount shall I state to them; I told "him ten to twelve thousand cords."

Counsel for the plaintiff, Mr. McCagg, in the course of his argument to the jury, by consent, read the following testimony from the deposition of John Heck, taken in Chicago: It was delivered along during the course of the summer, in 1869, and it was to be measured as we got it out.

* * * * * * *

All the particular conversation we had in reference to that was based on the first year's agreement.

* * * * * * *

57 From the bill of exceptions on the trial at Kokomo, counsel for plaintiff read from the evidence of John Heck as follows (in reference to the terms of this contract the witness said):

"That I would furnish to the railroad company wood at the old "price. He asked me how much I would get out, and I told him "about the same quantity as I had got out last year—from ten to "twelve thousand cords I said I would get out, and then asked him "about the pay for it, and he said that they would pay the same "price they had paid to me the previous year, and that they would "measure it up and pay for it in the same way as they had done "the previous year.

* * * * * * *

"Before that time I had directed Mr. Lane to see Mr. Rudolph "and inquire of him what Mr. Caldwell had said to him about the "wood.

"Mr. Rudolph agreed with you to take the wood up as they had "taken it up during the year previous?

"A. I didn't have land at that time to cut the wood from, and "after he made that agreement with me I bought some land and "sent down men and had most of the wood cut during the "winter.

* * * * * * *

"Got out ten or eleven thousand cords, expecting they would "take it up as they had taken it up the year previous. Mr. Ru- "dolph stated to me that the railroad company would take it up "within the year 1870.

"Before that time I had directed Mr. Lane to see Mr. Rudolph "and inquire of him what Mr. Caldwell had said to him about the "wood. Mr. Rudolph agreed with me to take the wood as they "had taken it up the year previous. I did not have land
58 "at that time to cut the wood from. I think after he made "that agreement I bought some land and sent down men "and had most of the wood cut during the winter. I had about "ten or twelve thousand cords, expecting they would take it "up as they had done of me the year previous. Mr. Rudolph stated "to me that the railroad would take it all up within the year 1870. "Mr. Rudolph measured a small lot in the year 1870. I measured "small lots.

"I went to Logansport in 1871 and saw Mr. Caldwell and spoke "to him of their failure to take the wood as they had agreed to do. "He said to me we have got to take up only a portion of it; that "they were acting under restrictions. Mr. Caldwell was general "agent, &c. I spoke to Mr. Caldwell at that time about the fixed "agreement to take up the wood, and said to him that they agreed "to take it up. He replied, we didn't agree when we would pay "for it. I told him I thought when nothing was said about the "time of payment that it meant a cash payment. He told me we "will give you a fair division. I told him that Mr. Rudolph had "agreed with me to take the wood at the price paid me in 1869, "and would measure it up as he had measured up the wood bought

"of me in that year. I told him that Mr. Rudolph had said to me "in 1869, 'When you get a thousand cords or so let me know and "I will measure it up.' The first time I saw Mr. Caldwell about "it was at Logansport. It was in the fall of 1870. I said to him "the company was not taking up the wood as fast as I expected it "would do, and that I had come to see him about it. I then stated
"over to him the bargain that I had made with Mr. Rudolph
59 "and the way I had been delayed by the company, and Mr.
"Caldwell then said to me I will do the best I can for you "and give you the back measurement next month."

60 Gentlemen of the jury, the plaintiff in this case alleges that in the forepart of January, 1870, he entered into a contract with the defendant by which he agreed to cut, haul, and deliver to the defendant, upon the line of defendant's railroad, near Kokomo, Indiana, a large quantity, say from ten to twelve thousand cords of firewood, for which the defendant agreed to pay the plaintiff at the rate of $2.40 per cord. That, in pursuance of said agreement, he did cut, haul, and deliver said wood during the year 1870, and that the defendant refuses to pay for 3,153 cords of said wood so cut and delivered under and pursuant to said contract.

The plaintiff also alleges that he made a contract to cut, haul, pile, and make ready for delivery upon said railroad, at the place aforesaid, a quantity, say ten to twelve thousand cords of firewood, which the defendant was to accept, measure, and pay for from time to time during the year 1870, as the same was ready for delivery and measurement, and that he did cut, haul, pile, and make ready for measurement and delivery a large quantity, to wit, the full amount of said contract, and requested the defendant to measure and pay for the same, but that the defendant refused to measure and pay for a large quantity, to wit, seventy-five hundred cords, and that a large quantity, to wit, 3,153 cords of the wood which the defendant so refused to measure, was, without the fault of the plaintiff, consumed by fire while waiting such measurement.

I need hardly say, that both these phases of this contract
61 refer really to one contract, which has been given in evidence before you, or which has been alluded to, by the witnesses. The plaintiff has changed the phraseology to adapt it to a certain extent undoubtedly to the proof as it shall have been developed before you.

The defendant denies that it ever made such a contract as that set up, and insists that if any contract was made, it was that the wood in question should be cut and hauled on the defendant's railroad line, and there remain the property of the plaintiff until such time as defendant should measure the same, and that the wood agent of the defendant should from time to time measure the said wood, and that the said wood should only become the property of the defendant, and the defendant be liable to pay therefor, when

and after the same had been measured and accepted by the defendant's agent as aforesaid.

This contract was entirely in parole, that is, it is not a written contract, and whether such a contract was made or not, depends entirely upon the testimony which has been adduced before you, and your finding upon that testimony. The evidence is, to some extent, contradictory, and it is the duty of the jury to determine or find as a matter of fact from the evidence, whether such a contract as that alleged by the plaintiff was made between the parties or not, or to decide, in other words, whether there was any contract, and if so, what contract touching this wood made, and if the contract was such a one as is set up by the plaintiff.

The plaintiff has offered evidence tending to show that substantially such a contract as he claims was made. This evidence
62 tends to show, in the first instance, and perhaps that may not be considered as a disputed proposition in the case, that in the fall of 1868 a contract was made between the plaintiff and the defendant, by which the plaintiff was to cut and deliver upon defendant's line of railroad, near Kokomo, the wood from a certain tract of land, which it was estimated would amount to somewhere from ten to twelve thousand cords, and that the defendant was to measure—take up, as the witnesses express it—this wood, and pay for it during the year 1869, and plaintiff did so deliver said wood, and the defendant did measure and accept it during the year and pay for it substantially.

This contract is of no importance to the case further than it is referred to as the standard for the subsequent contract, which the plaintiff alleges was made between the parties in reference to the lot of wood in controversy. So far as the contract of 1869 (that is the one made in 1869 for the wood which was to be delivered in 1870—the wood in controversy) referred back to the previous contract for its terms, just so far that contract becomes material to your consideration and no further, as there is no controversy about the performance of that contract.

The plaintiff appears as a witness and testifies to the contract substantially as set up in the first count of the declaration. He also produced a witness, Mr. Lane, who testifies to many facts corroborating, or tending to corroborate, the plaintiff's testimony. The testimony of both these witnesses tends to prove the plaintiff's case, and tends to show that a contract such as is alleged was in fact made between the parties.

63 The defendant, for the purpose of rebutting or contradicting the testimony on the part of the plaintiff, introduces the witness, Mr. Rudolph, who testifies to a different contract from that set up by the plaintiff in many of its important particulars. The defendant has also introduced evidence of various circumstances in regard to the manner in which the work was done, and to what transpired during the time this wood was upon the defendant's line

of road, and the testimony of the plaintiff and of Lane, as witnesses in divers suits which have taken place since the loss of this wood, for the purpose of showing that the plaintiff has given a different version of this contract from that which he has given now upon the stand. It is conceded, for instance, that in the month of March, 1871, the plaintiff obtained insurance upon the wood in question, after it was delivered—long after it was delivered upon the defendant's line of road, and that he kept the insurance alive by renewals until the 9th of October, at the time when it was destroyed. That suits were had between the plaintiff and the insurance companies touching this loss, and upon the trial of one suit between the plaintiff and the Home Insurance Company the plaintiff was examined as a witness. His testimony on that trial, so far as it refers to the subject-matter of this contract, the defendant has produced for the purpose of showing, as I have already said, that he gave a different version or coloring to the transaction then from what he does now. After the disposition of the insurance cases the plaintiff entered a suit against the defendant in Howard county, Indiana, for substantially the same cause of action which is in controversy before you now. This suit was tried before the circuit court of Howard county, and the plaintiff and Mr. Lane and Mr. Rudolph were all witnesses there, and what they said there as witnesses in reference to
64 this contract has been introduced in evidence for the purpose of showing a somewhat different phase or coloring of the contract in question from what was given on this trial.

With the insurance transaction as such this jury have nothing to do, except so far as the plaintiff s testimony on that trial tends to elucidate his understanding of the contract between himself and the defendant. The jury and the court have no concern with the insurance transaction. If that insurance was obtained by a false or wrongful statement of Mr. Heck's interest in the wood, or if he recovered before the court where he brought suit upon those policies upon a misapprehension of his rights; or in other words, if the court before whom those insurance cases were brought and tried committed error on the trial of those cases and gave the plaintiff a judgment to which he was not entitled, this court and this jury have nothing to do with that transaction, nor have you anything to do with the amount which was collected by virtue of that insurance. As the defendant was a stranger to the insurance transaction, not having paid the premium nor requested the plaintiff to obtain the insurance, the defendant cannot now avail itself of the benefit of whatever the plaintiff recovered under those insurance policies. That is a matter resting entirely between the insurance company and the plaintiff, and with which the defendant has nothing to do.

So, too, in regard to the interest which it is alleged Lane and Owings have in the subject-matter of this controversy. There is testimony tending to show that after this contract was made between the plaintiff and the defendant, he entered into an arrange-

ment with Lane and Owings by which they were to have an interest in the profits of the transaction, as compensation for
65 their services, and that after the suits with the insurance company were through, an arrangement was made, between the plaintiff and Lane and Owings, by which they were to have the benefit of whatever recovery should be had in this suit or in the suit at Kokomo as against this railroad company. The contract, if one was made, was between the plaintiff, Mr. Heck, and the defendant; and Lane and Owings were not parties to that contract, and the legal title to whatever is to be recovered would be in Mr. Heck, although it might be recovered for the benefit of Lane and Owings, therefore it is no matter of defence in this case, and should not be considered as such, that this suit may be prosecuted wholly for the benefit of Lane and Owings. If you are satisfied the contract was made between Mr. Heck and the defendant, as set up in the declaration in the case, and as the proof tends to show, then it makes no difference to us where the proceeds of the recovery, if one is had, go, as between Mr. Heck and Lane and Owings. Lane and Owings may be entitled, by virtue of a private agreement between themselves, to the entire benefit of the contract.

As I have already said to you, gentlemen of the jury, this case is one where there is quite a decided conflict of evidence, and it becomes the duty of the jury to decide upon the credibility of witnesses and where the preponderance of evidence lies; in other words, it is for you to say, in the light of the testimony on the part of the plaintiff and of the defendant, whether the plaintiff has by a fair preponderance of testimony made out such a contract as he alleges was made between himself and the defendant. Does the evidence when all considered satisfy you that such a contract was made, that this company did actually agree to pay for this wood
66 during the year 1870, and that all that there was to be done and performed on the part of Mr. Heck was done by him in the fulfillment of that contract, and that defendant is alone in default This is, as I have said, a question of fact with which the court has nothing to do, which is wholly to be resolved by you, in the light of all the testimony in this case. For this purpose you should consider all the features of the testimony, both what the plaintiff says here now and what he has formerly said. You should also consider the difference between the issues upon the trial here and the former trial, as far as they have any bearing upon the question which you are to investigate and solve. You should also consider the testimony of Mr. Rudolph in the same light, as he has also been examined in all these former suits I believe, and has testified and given his version at different times of the contract in question.

You should also consider the interests of all the parties who have testified, how far that has a tendency to color or in any degree modify their testimony. The testimony in the case has established, or tends to establish, perhaps, a contract, or three different phases

of a contract. First, a contract by which the plaintiff was to deliver the quantity of wood alluded to upon the line of defendant's railroad near Kokomo, and be paid for the same at the price stipulated by or during the year 1870. The second phase, perhaps, is that the plaintiff agreed to deliver the wood upon the line, and the defendant was from time to time to accept and measure the wood, and from the time that it was measured and accepted it was to become the property of the defendant and the defendant pay for it.

67 The third phase is that the wood was to be delivered upon the defendant's line during the year 1870, and was to be measured, and accepted, and paid for during the year 1870; and the defendant requested the plaintiff not to insist upon the measurement during that year, but to let it run along and allow the defendant to take it up at such times afterwards as would suit the defendant's convenience, thereby waiving the provisions of the contract as at first made, and allowing the defendant further time in which to measure and accept the wood, and during the time that the measurement of the wood was delayed at the defendant's own risk, the fire occurred and the wood was destroyed.

I say the testimony in this case tends to prove, perhaps, either of these phases of this contract, and it is for you to say whether either of these are proved, and, if so, which, or whether the testimony tends to prove still another and that which is insisted upon by the defendant.

I then say to you as a matter of law, that if you are satisfied from the evidence that it was agreed between the plaintiff, Mr. Heck, and the defendant that the plaintiff should, during the year 1870, cut and deliver upon the defendant's line of railroad, at points to be designated by the defendant's agent in that behalf, a quantity of from ten to twelve thousand cords of firewood, and that the defendants agreed to receive and measure the said wood and pay for the same at the rate of $2.40 per cord during the year 1870; if you are are also satisfied from the evidence that the plaintiff did cut and deliver said wood upon the line of said railroad according to the terms of his contract, then the defendant became liable to

68 pay for the said wood at the contract price during the year 1870. And if you find from the evidence that the defendant has failed to pay for any part of the said wood so delivered, after being requested so to do, the defendant is liable for the contract price, with interest thereon from the time the said wood should have been paid for; that is, the defendant would have the whole of the year 1870 in which to measure the wood, and interest would not begin to run until after say thirty or sixty days from the first of January, 1871. If you are satisfied that by the terms of the agreement the said wood was to be paid for by the defendant within not to exceed thirty or sixty days from the time it was measured. And if you are satisfied from the evidence that the plaintiff agreed with the defendant to cut said wood and haul and

pile the same upon the line of the defendant's railroad near Kokomo, and that the defendant agreed to measure and accept said wood from time to time as the same was made ready on said line, and to so measure and pay for said wood at the rate mentioned during the year 1870, and that the plaintiff did get out said wood pursuant to the said contract and have the same ready for measurement during the year 1870, and that the defendant knowing, through its proper agent, that said wood was so ready on the line, requested the plaintiff to delay his demand that said wood should be measured and paid for within a year, and that the plaintiff should not insist upon a strict performance of the terms of the contract as to the time of measurement and payment; and that while the said measurement and payment were both so postponed and delayed by and at the request of the defendant, the portion of wood
69 now in controversy was burned on the line of the defendant's railroad, without the fault of the plaintiff, then the defendant is liable for the contract price of the said wood, and interest thereon from the time the same was burned. If you are satisfied from the evidence that it was agreed between the plaintiff and the defendant that the plaintiff should, during the year 1870, cut and haul upon the defendant's line of railroad a quantity of say from ten to twelve thousand cords of firewood, which the defendant was to accept and measure from time to time during the said year 1870, as the same should be hauled, piled, and made ready, and pay for the same at the rate of $2.40 per cord; and if you are further satisfied from the evidence that the plaintiff did, during the year 1870, cut, haul, pile, and make ready said quantity of wood, according to the said agreement, and request the defendant to measure and pay for the same according to the terms of the said agreement, and that the defendant refused to measure and pay for the said wood when requested so to do, after the same was so cut, hauled, piled, and ready for delivery, then the plaintiff is entitled to recover as damages in this action the difference between the contract price of $2.40 per cord and the price at which he could have sold said wood to others at said place. And the jury must determine from the evidence whether the said wood had any value at the place where it lay on the line of the defendant's railroad except to sell to the defendant.

If you are satisfied from the proof that the said wood could not have been sold except to the defendant, then the contract price and interest from the time the defendant made default will be the measure of damages. If you find that the wood had any market value, then the measure of damages will be the difference between
70 the contract price, and what it could have been sold for at that place and time, with interest upon the said difference; interest in all cases to be computed at the rate of six per cent. Gentlemen, if you are satisfied from all the evidence in the case, that the said wood was, by the contract between the parties, to be

placed upon the line of the defendant's railroad at the point indicated or designated by the defendant's agent, and there to remain the property of the plaintiff until such time as the defendant should measure and accept said wood, and that the wood in question had never been measured and accepted by the defendant at the time it was burned, then the defendant is not liable in this action for the price of the said wood, or for any damages in consequence of its refusal to receive or pay for the same.

The form of your verdict, gentlemen, will be, if you find for the plaintiff: "We, the jury, find the issues for the plaintiff and assess damages," at so much. If you find for the defendant, you will simply say: "We, the jury, find the issues for the defendant."

And thereupon the jury rendered a verdict against the defendant; whereupon the defendant, by its counsel, then and there moved the court to set aside the verdict so rendered, and grant a new trial of this cause, and filed the reasons in writing for its motion, as set out on page 16 of this record.

71 But the court denied the motion, and gave judgment on the verdict against the defendant, to which decision of the court, in denying such motion, the defendant, by its counsel, then and there excepted.

And for as much as the matters above set forth do not fully appear of record, the defendant tenders this its bill of exceptions, and prays that the same may be signed and sealed by the judge of this court, which is done accordingly this — day of ———, A. D. 1877.

H. W. BLODGETT, *Judge*. [SEAL.]

Endorsed: Filed Dec. 16, 1876. Wm. H. Bradley, clk.

72 Afterwards, to wit, on the 6th day of February, A. D. 1877, said defendant, by its solicitors, filed in said clerk's office its bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

In the Supreme Court of the United States.

JOHN HECK, WHO SUES FOR THE USE OF SAMUEL G. Lane, Nathaniel J. Owens, and John Leach, *vs.* PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY Company.	Assumpsit.

Know all men by these presents, that we, The Pittsburgh, Cincinnati and St. Louis Railway Company, as principal, and Elijah S. Alexander and Edwin Walker, of the county of Cook and State of

Illinois, as sureties, are held and firmly bound unto John Heck, who sues for the use of Samuel G. Lane, Nathaniel J. Owens, and John Leach, in the penal sum of fifteen thousand dollars, to be paid the said John Heck, his executors or administrators. To which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors,
73 our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this first day of February, A. D. 1877.

Whereas the above-named Pittsburgh, Cincinnati and St Louis Railway Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Circuit Court of the United States for the Northern District of Illinois, for the sum of ten thousand dollars, besides costs of suit, at the October term thereof, to wit, on the 16th day of December, A. D. 1876.

Now, therefore, the condition of this obligation is such that if the above-named Pittsburgh, Cincinnati and St. Louis Railway Company shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THE PITTSBURGH, CINCINNATI AND
[SEAL.] ST. LOUIS RAILWAY CO.
By W. THAW, *2d Vice-Prest.*
EDWIN WALKER. [SEAL.]
ELIJAH S. ALEXANDER. [SEAL.]

Attest—W. H. BARNES, *Secretary.*

74 Approved—H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Feby. 6, 1877. Wm. H. Bradley, clk.

75 NORTHERN DISTRICT OF ILLINOIS, *ss.*

I, William H. Bradley, clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein John Heck, who sues for the use of Samson G. Lane et al., is the plaintiff, and Pittsburgh, Cincinnati and St. Louis Railway Company is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 12th day of September, A. D. 1877, and of our independence the 101st year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

76 UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

The United States of America to the judges of the Circuit Court of the United States for the Northern District of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between John Heck, who sues for the use of Samson G. Lane, Nathaniel J. Owens, and John Leach, and Pittsburgh, Cincinnati and and St. Louis Railway Company, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Pittsburg, Cincinnati and St. Louis Railway Company, as by its complaint appears, and it *is* being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1877, in the Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this third day of February, in the year of our Lord one thousand eight hundred and seventy-seven, and of the independence of the United States the 101st year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Endorsed:) Supreme Court of the United States. Pittsburgh, Cincinnati and St. Louis Railway Co., plff. in error, vs. John Heck, who sues, &c., defts. in error. Writ of error.

77 UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

To John Heck, who sues for use of Samson G. Lane, Nathaniel J. Owens, and John Leach, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1877, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Northern District of Illinois, wherein the Pittsburgh, Cincinnati and St. Louis Railway Company is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be cor-

rected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 15th day of September, in the year of our Lord one thousand eight hundred and seventy-seven. H. W. BLODGETT, *Judge.*

Service of this citation admitted, this 15th day of September, A. D. 1877. E. P. McCAGG,
Of Counsel for Dft.

(Endorsed on cover:) N. Illinois C. C. U. S. No. 496. The Pittsburgh, Cincinnati and St. Louis Railway Company, plaintiff in error, vs. John Heck, who sues for the use of Samson G. Lane, Nathaniel J. Owens, and John Leach. Filed 9th October, 1877.

FILED
MAR 27 1880
P. W. MIDDLETON, Clerk.

SUPREME COURT OF THE UNITED STATES.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error.

v.

JOHN HECK, FOR USE OF LANE, ET AL.
Defendant in Error.

Error to the Circuit Court of the United States, for the Northern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

E. WALKER,

ATT'Y FOR PLAINTIFF IN ERROR.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.

1880.

rected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 15th day of September, in the year of our Lord one thousand eight hundred and seventy-seven. H. W. BLODGETT, *Judge*.

Service of this citation admitted, this 15th day of September, A. D. 1877. E. P. McCAGG,
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(Endorsed on cover:) N. Illinois C. C. U. S. No. 496. The Pittsburgh, Cincinnati and St. Louis Railway Company, plaintiff in error, vs. John Heck, who sues for the use of Samson G. Lane, Nathaniel J. Owens, and John Leach. Filed 9th October, 1877.

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Defendant in Error.

Error to the Circuit Court of the United States, for the Northern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

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1880.

SUPREME COURT OF THE UNITED STATES,

THE PITTSBURGH, CINCINATTI AND ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,
v.
JOHN HECK, FOR USE OF LANE, ET AL.,
Defendant in Error.

Error to the Circuit Court of the United States, for the Northern District of Illinois.

STATEMENT OF CASE.

The declaration charges (pages 2 to 5 of printed record):

First. That the defendant, on the 1st day of January, 1870, promised to buy of the plaintiff eleven thousand cords of firewood, to be delivered on the line of defendant's railway, from time to time during said year, and to pay therefor at the rate of two dollars and forty cents per cord, and in consideration thereof the plaintiff agreed to deliver said eleven thousand cords of firewood as aforesaid.

That the plaintiff did, during the said year of 1870, deliver said eleven thousand cords of firewood on the line of said railroad, for all of which the defendant has paid at the rate of two dollars and forty cents per cord, except as

to a large quantity, to wit: three thousand one hundred and fifty-three cords thereof; and that as to the said last mentioned quantity, the said defendant then and there undertook to pay, &c., but though often requested, has refused so to do, &c.

Second. That the defendant, on the first day of January, 1870, promised the plaintiff that if he would cut, haul and pile upon the said railroad eleven thousand cords of firewood, that the defendant would receive in the said year of 1870, and measure the same as it should be hauled, piled and made ready for use, and pay for same at the rate of two dollars and forty cents per cord.

That in consideration thereof the plaintiff promised to provide and pile upon the line of said railroad, during the year 1870, eleven thousand cords of firewood, and to make the same ready for the plaintiff in error to measure; and that he did so perform upon his part, but the defendant neglected and refused to measure a large quantity thereof, to wit: seven thousand six hundred and seventy-six cords, and that while the plaintiff was so ready and willing, &c., a large quantity of said firewood, to wit: three thousand one hundred and fifty-three cords thereof, without the fault of the plaintiff, was consumed by fire.

That the defendant, in consideration of the premises, undertook and promised to pay for said last mentioned firewood at the rate of two dollars and forty cents per cord, but has neglected and refused so to do.

Third. Common counts.

The first count of the declaration declares upon a contract of sale and delivery of eleven thousand cords of wood, at two dollars and forty cents per cord, and a failure to pay for three thousand one hundred and fifty-three (3,153) cords.

The second, upon a contract to receive a like quantity

during the year 1870; a readiness to deliver upon the part of the plaintiff below; a refusal to receive a portion thereof, and a loss by fire of three thousand one hundred and fifty-three (3,153) cords of the same.

The record shows that the first contract, or pretended contract, between the parties was entered into in the month of December, 1868, by the terms of which the plaintiff agreed to cut and place upon the line of railway, at a point to be designated by the defendant, between the towns of Kokomo and Galveston, in the State of Indiana, from ten to twelve thousand cords of wood. The defendant was represented by its agent, D. A. Rudolph, and the plaintiff, in person. For the wood the railway company agreed to pay at the rate of two dollars and forty cents per cord; it was to be delivered during the season of 1868.

In referring to this contract, the plaintiff, in his evidence (page 15, printed record), says: "It was to be delivered in "the course of the ensuing summer." Rudolph said: "I will measure it most any time you want; whenever "you get out a lot of two or three thousand cords we will "measure it out, and you send in your voucher and you "will get your pay for it the next month." The witness further says: "It was to be taken up in the course of the "ensuing summer, that it was to be delivered and all "taken up in that season and paid for within thirty days."

This was the agreement claimed to have been entered into between the parties, in December, 1868.

This wood was put upon the line of railroad, received by the company, and paid for during the season of 1869. In December, 1869, Heck and Rudolph entered into another agreement for a like quantity of wood to be put upon the same line of road, and in the same locality. Referring to this agreement, Mr. Heck (page 15, printed record) says: "Told him I "had bought more land, and would probably give him

" same quantity I had last; said he would give me same " price, and pay for it in same way, and take up and " measure it in same way. It was placed along the side " of the track, where Rudolph directed us to put it, " and we frequently called on the agent to come and " measure and receive it. I think it was all delivered in " the fall of 1870." (Page 16, printed record.)

On page 17 the witness says : " At the conversation in " December, Rudolph said he would take it up as he had " done the year before; do not think he took it up faster " than the company wanted it under the first contract; the " company did not want to pay for so much at a time."

Mr. Rudolph's recollection of the contract does not differ materially with Mr. Heck's, except as to the time within which the contracts were to be performed. The plaintiff in error admitted that under the contract of 1868 the company was to receive from Mr. Heck all of the wood cut from three hundred and twenty acres of land estimated at from ten to twelve thousand cords, but denies that the company ever agreed to receive and pay for the whole amount of such wood during the year 1869.

Rudolph says (page 21, printed record) that he asked Heck " how soon he would cut it, or deliver it and put it " out on the road. He said he did not know, but he " would cut it and haul it out as soon as he could. I told " him we would take up the wood as fast as we could use " it, and perhaps as fast as he could get it out, and would " pay for it within thirty or sixty days from the time I " measured it. I told him I presumed we would take it " up about as fast as he got it out. I think the hauling " was done continuously during each month until the con- " tract was completed, after they had commenced. I had " no fixed time for measurement; measured when best " suited the interests of the company to do so. The in- " terest that controlled me was consumption. I was con-

"trolled entirely by consumption of wood by our engines. "Some months we used more, and some months we used "less."

On page 22, he says that, "during the fall of 1869, Mr. "Heck was anxious to continue cutting and putting out "wood at the same place, and we had several conversa- "tions as to what the company would want in the future, "and he wanted to know if he could not get a contract to "deliver wood in 1870. Nothing was said as to the quan- "tity he should deliver. He told me he wanted to get out "about the same amount of wood in 1870 that he did in "1869. Nothing was said at that interview as to measure- "ment, or receiving it, and have no recollection of his re- "ferring to my manner of measuring or receiving wood in "1868 or '9. Had no contract with him in 1868 to receive "any amount in any one month, and did not agree with "him to receive all the wood he should put out during any "one year, or as soon as he put it out. (On page 23.) "Pursued the same course as to the measurement of Mr. "Heck's wood, under the contract of 1870, as I did in "1869; that is, took what the company could use, "and what the company required from time to time. "The company did not consume as much wood in "1870 on that division of the road as it did in 1869; as "a matter of fact, neither Mr. Heck's wood under either "contract, or anybody else's wood on the road, was taken "up by the company and used until after it had been "measured and marked as accepted by me."

Here is a direct conflict of evidence as to the time when the company should receive and pay for the wood under either contract. The plaintiff below claiming that, under the contract of 1868, the company had agreed to receive and measure all of the wood put upon the line of road in the year 1869, during that current year, and that the second contract simply followed the first in this respect;

while the company denies that it ever undertook, or agreed to receive the wood any faster than necessary for its consumption, and did not bind itself to receive any given quantity of wood, during either the year of 1869 or '70. It is apparent, however, that under either contract, the placing of the wood upon the company's line adjacent to its track, was not considered a delivery; that the company did not receive the wood until its agent had measured the same and marked it as the property of the company; that this was done from time to time, as the company required it for its use, without regard to the amount which Heck had placed upon the line; that after such measurement, vouchers were made for Mr. Heck for the amount thus measured and paid during the following months, and that until such measurement, Heck continued to exercise acts of ownership over all the wood that had been placed upon the company's line.

In March, 1871, he instructed his agent to take out three policies of insurance on this wood, of two thousand dollars each (printed record, page 17), describing it as his wood in the policy. He says, "that the company that in-"sured it, understood precisely how the wood stood." After the wood had been destroyed by fire, he brought suit against the Home Insurance Company of New York upon its policy of two thousand dollars, and recovered a judgment for the amount. Upon the three policies, he received the amount of four thousand nine hundred dollars ($4,900) for his loss sustained by the fire.

On page 18, he says: "I considered it my property, put "there for the company, and put where they told me to "take it. It was my property, as I understood it. It was "a breach of contract in not taking the wood as I con-"sidered it. That is what I think I sued the insurance "companies for, for the value of the wood destroyed, be-'cause it was my wood that was destroyed, and I swore

"it was my wood, because I believed it was my wood at "the time of the fire."

The agent of the insurance company says that: "On "the third of April, 1871, Mr. Heck applied for this in- "surance, and that he did not understand that anybody "else had any interest in it at that time, except himself. "He described it as his property. There was no limita- "tion of Mr. Heck's ownership in either policy." (Printed Record, p. 26.)

Owens, who is one of the parties for whose use and benefit this suit is prosecuted, admitted that on the trial of the case against the Home Insurance Company, he testified that "John Heck owned the wood; that his money "paid for the cutting and hauling of it." (Printed Record, page 20.)

It appears from the record, (page 27), that the case of Heck against Home Insurance Company, in the Cook County Circuit Court, was tried in the winter of 1872. The insurance company prosecuted an appeal to the Supreme Court of the State, (reported in the 65th Illinois, page 111).

It also appears that the insurance companies in that case claimed, that the wood destroyed was the property of the railroad company, and that the plaintiff had no right to recover. Rudolph and Heck were the witnesses in that case, and the evidence touching the contract of 1869 was substantially the same as in the case at bar; but the court held that there was no evidence establishing the title in the wood destroyed, in the railroad company.

It further appears from the record, that Heck parted with his interest in the wood when he recovered his judg ment against the insurance companies. That he then sold his interest in the wood to Lane and Owens, for whose use and benefit this action is brought, (cross-examination printed record, page 16); also, that in 1873, the plaintiff

brought an action against the defendant in the Circuit Court of Howard County, State of Indiana, upon the contract of December, 1869. This action was prosecuted by Heck, in his own name, and it did not appear that he had parted with his interest in the contract as now claimed.

On page 20, Owens says, that whatever is recovered is to be divided between Mr. Lane and himself; that Mr. Heck had realized whatever interest he had in the contract, and that he did not know why Mr. Heck had prosecuted this suit in his county (Howard) in his own name, and not in the name of Owens and Lane.

In the case in the Howard Circuit Court, Heck recovered a judgment against the company for seven thousand four hundred dollars ($7,400.00). From this judgment the company appealed to the Supreme Court of the State of Indiana, (reported in 50th Indiana, page 303).

The Supreme Court reversed the judgment of the court below, holding that the title of the property had not passed from the vendor, at the time it was destroyed by fire, and he must bear the loss.

It further appears from the record, that neither of the parties interested in this contract, after the failure of the company to measure and receive the wood in 1871, made any effort to dispose of such wood or any part of it to other parties, or to ascertain whether such sale could be effected. Heck says (page 18) that he inquired of only one person, and did not believe he made any inquiries to see whether he could sell the wood at any other place. Lane (page 19) says, that, in his opinion, there was no market for this wood except to the railroad company, and that he never made any inquiry or attempt to sell it to anybody else; while Owens (page 20) says, that there was no market value after the first of January, 1871, except to the railroad company, but admits that Davis & Co. bought wood in that vicinity from some of the farmers on specu-

lation, but he did not know whether they would have bought this wood.

Upon cross-examination, he admits that Mr. Heck bought twelve hundred cords of wood from other parties, and that other parties sold to Davis & Co.; that he did not attempt to find out what the value of this wood was, but that he was simply holding it for the railroad company until it was ready to take it up, and never attempted to sell to any other person. Rudolph, whose business brought him in contact with parties buying and selling wood in that vicinity, on page 23, gives the names of several firms who were buying wood in that locality, and selling it to the railroad company.

He says, that in the fall of 1870 and in 1871 in his opinion three thousand cords of that wood could have been sold in that neighborhood and marketed to other parties; that there were parties buying wood along the line of road, and holding it until the company would purchase and pay for it.

From the record it therefore substantially appears, that during the year 1870, the plaintiff cut and placed adjacent to the defendant's line of railroad upwards of ten thousand cords of wood, under an agreement, that the plaintiff in error should measure and take up and pay for the same, at the rate of two dollars and forty cents per cord; that but a portion of this wood was taken up during the year 1870; that in the summer of 1871, the defendant in error exercised acts of ownership over all of the wood, that had not been measured and delivered to the company; that at his own expense he employed men to protect and guard such wood against fire, and also took out policies of insurance upon three thousand cords of the same.

That in October, 1871, three thousand one hundred and fifty-three cords of the wood so insured was destroyed by fire. The insurance companies refusing to adjust such loss,

the defendant in error brought suit upon such contract of insurance, and recovered from the companies on account of such loss the sum of four thousand nine hundred dollars ($4,900). After this, the defendant in error parted with all his interest in such contract, assigning the same to Lane and Owens, who from that date claimed to be the only parties interested in the contract of December, 1869.

That afterward, Heck in his own name brought suit against the plaintiff in error in the Howard Circuit Court of Indiana, for breach of contract, of December, 1869, and recovered judgment for upwards of seven thousand dollars. Upon appeal to the Supreme Court of Indiana, this judgment was reversed.

The defendant in error then commenced the present action for the use and benefit of Lane and Owens, claiming as damages, by reason of the failure or refusal of the plaintiff in error to measure and accept the wood destroyed by fire, the full contract price thereof, and has obtained judgment for the sum of ten thousand dollars as his measure of damages.

ERRORS ASSIGNED.

Now comes the Pittsburgh, Cincinnati and St. Louis Railway Company, by E. Walker, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. That the Court erred in charging the jury as follows, to wit:

" The plaintiff has offered evidence tending to show that " substantially such a contract as he claims was made. " This evidence tends to show in the first instance, and " perhaps that may not be considered as a disputed propo- " sition in the case, that in the fall of 1868 a contract was " made between the plaintiff and defendant by which the " plaintiff was to cut and deliver upon defendant's line of " railroad, near Kokomo, the wood from a certain tract of " land, which it is estimated would amount to somewhere " from ten to twelve thousand cords, and that the defend- " ant was to measure—take up, as the witnesses express " it—the wood, and pay for it during the year 1869.

" And plaintiff did so deliver said wood, and the de- " fendant did measure and accept it during the year, and " pay for it substantially.

" This contract is of no importance to the case, further " than it is referred to as the standard of the subsequent " contract, which the plaintiff alleges was made between " the parties in reference to the lot of wood in controversy. " So far as the contract of 1869, (that is the one made in " 1869, for the wood which was to be delivered in 1870, " the wood in controversy) referred back to the previous " contract for its terms, just so far that contract becomes " material to your consideration and no further, as there is " no controversy about the performance of that contract."

For that, there was evidence tending to show and did show that under the contract of the fall of 1868, the defendant did not undertake to measure and receive from the plaintiff ten to twelve thousand cords of wood, and pay for the same during the year 1869; but on the contrary, that under said contract the defendant was only required to receive so much of said wood from time to time, as its necessities required, and to pay for the quantities so received the month following its measurement; that the defendant never undertook to receive nor to pay for the whole amount of said wood within the year 1869.

Second. That the court erroneously charged the jury as follows, to wit:

"If that insurance was obtained by a false or wrongful "statement of Mr. Heck's interest in the wood, or if he "recovered before the court where he brought suit upon "these policies, upon a misapprehension of his rights; or "in other words, if the court before whom these insurance "cases were brought and tried, committed error on the "trial of these cases, and gave the plaintiff a judgment to "which he was not entitled, this court and the jury has "nothing to do with that transaction, nor have you any-"thing to do with the amount which was collected by "virtue of that insurance, as the defendant was a stranger "to the insurance transaction, not having paid the premium, "nor requested the plaintiff to obtain the insurance, the "defendant cannot now avail itself of the benefit of what-"ever the plaintiff recovered under these insurance "policies. That is a matter resting entirely between the "insurance company and the plaintiff, and with which the "defendant has nothing to do."

For that, there was no evidence that such insurance was wrongfully obtained, or that he recovered upon such policies upon a misapprehension of his rights, or that the court committed an error. And it was especially compe-

tent and proper for the jury to take into consideration the amount of money received from the insurance company on account of the loss of the wood in controversy, in estimating the plaintiff's damages, and that under the issues presented, it was the duty of the court to so charge the jury.

Third. That the Court erred in charging the jury as follows, to wit:

"The testimony in the case has established, or tends to "establish, perhaps, a contract, or three different phases of "a contract, by which the plaintiff was to deliver the "quantity of wood alluded to upon the line of defendant's "railroad near Kokomo, and be paid for the same at the "price stipulated by or during the year 1870. The second "phase, perhaps, is that the plaintiff agreed to deliver the "wood upon the line, and the defendant was from time to "time to accept and measure the wood, and from the time "it was measured and accepted, it was to become the "property of the defendant, and the defendant pay for it.

"The third phase, perhaps, is that the wood was to be "delivered upon the defendant's line during the year 1870, "and was to be measured—that that was the agreement "as it is set out in the first count, and accepted and paid "for during the year 1870, and the defendant requested the "plaintiff not to insist upon the measurement during that "year, but let it run along and allow the defendant to take "it up at such times afterwards as would suit the de-"fendant's convenience, thereby waiving the provisions of "the contract as at first made, and allowing the defendant "time—further time—in which to measure and accept the "wood, and during the time that the measurement of the "wood was delayed, at the defendant's own risk, the fire "occurred and the wood was destroyed. You may take, "perhaps, substantially this to illustrate: Suppose that a "man, being a farmer, should contract with a merchant to

" sell him his wool at a given price, to be delivered by a " given day, say the first of June, and on the first day of " June the farmer with his load of wool should go to the " merchant's warehouse and say to him, ' Here is the wool; " I propose to deliver it to you, and I want my money,' " and the merchant should say to him, ' Well, unload your " wool; leave it here in the warehouse, and to-morrow " morning we will weigh it, and I will pay you for it,' and if, " after the wool was unloaded and put into the warehouse, " and before it was weighed, the warehouse and contents " should be destroyed, the question would then be, would " that be a delivery, to charge the merchant with the price " of the wool; that is, was it in substance a substantial " performance on the part of the farmer of the contract he " had made?

" I say the testimony tends to prove perhaps either of " these phases of this contract, and it is for you to say " whether either of these are proven, and if so, which? or " whether the testimony tends to prove still another, and " that which is insisted upon by the defendant. I then say " to you as a matter of law that if you are satisfied from " the evidence that it was agreed between the plaintiff, " Mr. Heck, and the defendant that the plaintiff should " during the year 1870, cut and deliver upon defendant's " line of railroad, at points to be designated by the defend- " ant's agent, in that behalf, a quantity of from ten to " twelve thousand cords of firewood, and that the defend- " ant agreed to receive and measure the wood and pay " for the same at the rate of $2.40 per cord during the " year 1870; if you are also satisfied from the evidence " that the plaintiff did cut and deliver said wood upon the " line of said railroad according to the terms of his con- " tract, then the defendant became liable to pay for the said " wood at the contract price, during the year 1870. And " if you find from the evidence that the defendant has

" failed to pay for any part of the said wood so delivered,
" after being requested so to do, the defendant is liable
" for the contract price, with interest thereon from the time
" said wood should have been paid for; that is, the defend-
" ant would have the whole of the year 1870 in which to
" measure the wood, and interest would not begin to run
" until after, say, thirty or sixty days from the first of
" January, 1871."

Whereas, there is no evidence tending to show a contract designated in said charge, " the third phase." And the court especially erred in charging the jury as a matter of law (in substance) that if they believed from the evidence that it was agreed between the parties that the plaintiff should cut and deliver upon the defendant's line of road during the year 1870 from ten to twelve thousand cords of wood, and that the defendant agreed to receive, measure and pay for said wood during the year of 1870, at the rate of $2.40 per cord; that the plaintiff had performed his part of the contract, and that the defendant had failed to perform upon its part; that " then the defendant is liable
" for the contract price of wood with interest from the
" time said wood should have been paid for."

That such is not the rule of law touching the measure of damages for defendant's alleged breach of contract.

Fourth. That the court erred in instructing the jury as follows, to wit:

" If you are satisfied that by the terms of the agree-
" ment the said wood was to be paid for by the defendant,
" within, not to exceed thirty or sixty days from the time it
" was measured, and if you are satisfied from the evidence
" that the plaintiff agreed with the defendant to cut said
" wood and haul and pile the same upon the line of the de-
" fendant's railroad, near Kokomo, and that the defendant
" agreed to measure and accept said wood from time to

" time as the same was made ready on said line, and to so " measure and pay for said wood at the rate mentioned, " during the year 1870, and that the plaintiff did get out " said wood pursuant to the said contract, and have the " same ready for measurement during the year 1870, and " that the defendant, knowing through its proper agent that " said wood was so ready on the line, requested the plain- " tiff to delay his demand that said *would* should be " measured and paid for within a year, and that the plain- " tiff should not insist upon a strict performance of the " terms of the contract as to the time of measurement and " payment, and that while the said measurement and " payment were both so postponed and delayed by and at " the request of the defendant, the portion of wood now in " controversy was burned on the line of defendant's rail- " road without the fault of the plaintiff, then the defendant " is liable for the contract price of the said wood, and in- " terest thereon from the time the same was burned."

For that the plaintiff in error respectfully shows that the above instruction is wholly unsupported and unauthorized by the evidence.

Fifth. The judgment is not sustained by the evidence.

Sixth. The judgment is contrary to law and the evidence.

Seventh. The judgment is excessive.

And the said Pittsburgh, Cincinnati and St. Louis Railway Company prays that the judgment aforesaid may be reversed, annulled and altogether held for nought, and that it may be restored to all things which it hath lost by occasion of the said judgment.

E. WALKER,
Att'y for Pl'ff in Error.

ARGUMENT.

There is no evidence in the record in support of the first count of the declaration.

The contract of the parties was not of sale and delivery, but on the contrary the plaintiff undertook to cut and pile upon the defendant's right of way, or near its track, about eleven thousand cords of wood, and make the same ready for delivery. If there was any breach of contract upon the part of the plaintiff in error, it was in not receiving the wood according to the terms of the contract. Neither contract was definite in its terms.

At the first interview between the parties in October, 1868, the plaintiff had not then purchased the land, and was not then prepared to enter into any kind of contract. In December, 1868, the parties reached a conclusion. The plaintiff below says (printed Record, p. 15), he was to get out from ten to twelve thousand cords of wood during the ensuing summer; that it was to be taken up during that season, and paid for within thirty days. This the plaintiff claims was the contract of 1868, and that late in the fall of 1869, he told the defendant's agent that he had bought more land, and would probably give the same quantity as the preceding year; that the company agreed to pay him the same price, and measure and take it up as under the first contract. This is substantially the plaintiff's evidence touching the two contracts. A material question in the controversy is, whether the company, under either contract, agreed to receive the whole quantity of wood prepared during the ensuing season. Upon this question, Heck's evidence is as above stated, and upon page 17, he further states: "Do not think he took it up faster than

" the company wanted it under the first contract. The " company did not want to pay for so much at a time." While Rudolph (Rec., p. 21), fully states his understanding of the contract, and narrates the course pursued by him towards the plaintiff, and all others dealing with the company, whether under this, or any other wood contract. He had no fixed time of measurement, but was controlled entirely by the consumption of the company, and his instructions were not to carry a heavy supply of wood, nor more than was really necessary for the use of the company. It is apparent, from an examination of the record, that the company never understood that the Heck contract essentially differed from other wood contracts along its line, or that it was under any obligations to measure, receive and pay for this wood, in any greater quantities than necessary for its current use.

There were but two witnesses to the contract, Heck and Rudolph. While Heck's recollection of its terms is uncertain and indefinite, Rudolph's is clear and certain, and is supported by the reasonable custom of the company. If Rudolph's construction of the contract is to prevail, the judgment is wholly unsupported by the evidence—there has been no default upon the part of the defendant, and there can be no remedy.

If however, upon this proposition the judgment is to stand, then we insist that under the construction of the contract contended for by the defendant in error, the rule adopted by the court below as to the measure of damages is erroneous.

We have said there is no evidence in the record upon which a contract of sale and delivery can be supported, and in support of this proposition, we need not look beyond the evidence of the plaintiff himself. He admits that he was constantly urging Rudolph to measure and take up the wood. That he was keeping men to watch it,

and dug wells to protect it. That he urged the company's general manager to take up the wood, and caused it to be insured for his benefit and protection. (Printed Record, p. 16).

After the fire, the defendant in error brought his action against the insurance company upon the policies, and recovered in the aggregate $4,900. The insurance companies in defense claimed that the title to the wood had passed prior to the date of the policies to the railroad company, but the plaintiff in those actions, the defendant in error here, testified that the property was in himself, and the jury so found, and the courts, lower and Supreme, so held.

Upon the trial of this action, the plaintiff testified that it was his property, as he understood it, and that he sued the insurance company for the value of the wood destroyed, because it was his property. (Rec., p. 18).

Upon the trial of the actions against the insurance companies, the evidence of the plaintiff was supported by that of Owens, one of the parties to the record. (Rec., p. 20.)

Prior to the hearing below, the rights of the defendant in error under the contract in controversy, in two actions prosecuted by himself, had been judicially determined.

Home Insurance Company of New York v. *Heck*, 65*th Illinois, page* 112, was an action of assumpsit in the Cook County Circuit Court on a policy of insurance written by the insurance company upon the wood in controversy.

On page 116 the Court says: "Appellant contends that "it was the property of the railway company. If so, "appellee has no right to recover of appellant. What are "the facts? The wood was cut by appellee on his own "land, hauled to the line of the Pittsburgh, Cincinnati & "St. Louis Railway Company, corded and piled at

" Kokomo, a station on that road, and he testifies that it " was his wood when insured."

After referring to the testimony of William Jones and D. A. Rudolph, the Court further says: " We think this tes- " timony most conclusively settles the question of owner- " ship, and the trouble has arisen from the misuse of " the word *delivered.* It is very evident the wood was " the property of appellee when cut and hauled and piled " at Kokomo; as a mass it was his. It was deposited, not " delivered on the line of the railroad for the convenience " of the road, not delivered to them as their property, for " there was no one present to accept it. It was delivered " only in such quantities as the road wanted, and the " quantity was measured to them from any pile the com- " pany or its agent might select. As unmeasured piles, as " these were, they were the property of appellee. When " a pile was broken in upon and measured to the company, " that specific quantity belonged to the railway company, " and nothing more. * * * *

" There is not, in our judgment, a particle of proof to " establish title in these piles of wood covered by this " policy, in the railway company."

Pittsburgh, Cincinnati & St. Louis Railway Company v. *Heck*, 50*th Ind., page* 304, was an action upon the contract in controversy. In that action, as here, the complaint was in two paragraphs, substantially like the counts in the present declaration.

The main question (says the court) in the case arises upon the refusal of the court to give the following charge asked by the defendant, to wit: " Under the contract " sued on in the first and second paragraphs in the com- " plaint, the wood, by the plaintiff cut, hauled and piled up " along the line of the defendant's railroad, was not the " property of the defendant until measured and received " by defendant, and if you find that it was destroyed by

" fire before it was received, the loss is the plaintiff's, and " not the defendant's."

The Court further says that the " cause was tried and " the verdict evidently found upon the theory that the " measure of the damages was the contract price of the " wood.

" If this was legally correct, the charge ought not to " have been given, because the loss in such case would be " the loss of the defendant, and not the plaintiff."

The court held that the property had not passed from the vendor to the plaintiff at the time it was destroyed, and that he must bear the loss. On page 308 the Court says: " He kept the wood as his own after it should have been " received by the defendant. He insured it in his own name, " and for his own benefit, clearly evincing an election to " regard it as his own, and not the property of the defend- " ant. He must, therefore, accept the rule of damages " applicable to such case." The judgment was reversed.

We have shown that the plaintiff claiming title to the wood insured it as his property, and recovered of the insurance companies the amount of his policies. After this recovery, and after the balance of the wood had been taken up and paid for by the plaintiff in error, he assigns whatever remaining interest he still held in the contract to Lane and Owens. An action was then commenced and prosecuted in Indiana, claiming the full contract price for the wood burned, resulting as we have already shown. Then followed the present action, followed by a judgment for the full contract price, with interest.

If we are correct in assuming that the only breach or pretended breach of contract, as shown by the record, is the non-acceptance of the property contracted for, then we submit that the court below misapprehended the rights of the parties, and that the rule adopted touching the measure

of damages was erroneous; that in such cases the measure of damages is not the contract price, but only the actual damages which the complaining party has sustained.

It is submitted that the first error assigned is well taken; that the instruction removed and precluded from the consideration of the jury an important question of fact, and was calculated to mislead. The real question in controversy between the parties, is the time within which the plaintiff in error must perform its part of the contract.

Defendant in error claims that the company had undertaken and agreed to measure, receive and pay for the wood during the ensuing season, after the contract was made. The contract was entered into in December, 1869, and the defendant in error insists that by its terms and conditions it was to be fully performed during the year 1870. On the contrary, the plaintiff in error denies that it had undertaken to receive any given quantity of said wood within the year of 1870; but that it was to pursue the same course towards the defendant in error as towards other parties with whom it had contracts, or who might put upon the line of its road any given quantity of fire-wood, with the general understanding that such wood should be taken by the company as its necessities might require.

This was a material issue in the case. It is admitted that in the fall of 1868 the parties had entered into a certain contract, similar in its terms and conditions to the one in controversy, and that for the purpose of ascertaining the material elements of the contract of 1869, we should refer to the contract of the previous year. Under that contract the defendant denied its liability to measure and receive the full amount of wood put upon the company's line of road during the year 1869. It is evident that this was a material question of fact for the jury, yet the court instructs the jury that it might not be considered a disputed proposition in the case, " that under the contract of

" 1868, the plaintiff was to cut and deliver upon its line of " railroad near Kokomo, from ten to twelve thousand " cords of wood, and that the defendant was to measure " and take up such wood, and pay for it during the year " 1869."

The truth is, that this was the very proposition in dispute, and was a material question for the jury to determine.

In the case of *Burdell et al.* v. *Denig et al.*, 2nd Otto, page 716, it is held that it was error to assume facts as proven, that are not conceded by the parties, and that whether proven or not was a matter for the jury, and not for the court, to decide. In that case, because the court below assumed the function that belonged to the jury, and for that reason alone, the judgment was reversed.

We do not think that the use of the word " perhaps " saves or avoids the error. Under the instruction, the jury had the right to assume that under the contract the plaintiff in error was bound to measure, receive and pay for all the wood during the year 1870, leaving practically nothing for the jury to do but to assess the damages for the breach. The defendant denied this by plea and evidence, and had the clear legal right to the verdict of the jury upon the issue thus tendered. This instruction, followed by others, to which we filed exceptions, left for the jury nothing, except to ascertain the value of some three thousand cords of wood at the contract price.

As to second error: In this instruction the court seems to assume that the defendant procured such policies of insurance through his fraudulent representations as to the ownership of the property insured, and that the court erred in entering a judgment for the amount of such insurance. There is no evidence in this record showing, or tending to show, that Heck made any false representations as to the

title of property at the time the policies were written, but on the contrary he then represented what was undoubtedly the fact, that the title of the property was in himself. Upon trial of his actions in the Cook County Circuit Court, both Heck and Owens, as well as Rudolph, testified that at the time of the insurance, and the burning of the wood, it was the property of the plaintiff in that action, and on the trial of the present action, the defendant in error testified that the wood was put out for the company, that he considered it his property, and that it was a breach of contract on the part of the company in not taking the wood; that he sued the insurance company for the value of the wood destroyed, because it was his wood at the time of the fire (printed record, page 10). It would appear from this evidence that there was neither fraud in procuring the insurance, nor error in the court in giving judgment for the amount of the loss.

But we especially complain of this instruction in this: that it excludes from the consideration of the jury, the amount of money collected from said insurance companies under the policies referred to; that under the most liberal construction that can be given the contract, the plaintiff was only entitled to a recovery of his actual damages by reason of the non-acceptance of the defendant below. That if he had received prior to the bringing of this action about the sum of $5,000.00 an account of the loss of the wood in controversy, his real damages in this action cannot be greater than the contract price of the wood, less the amount he had received on account of such insurance. Had he sold the wood for $5,000.00,and then brought his action for breach of contract, under all the authorities his measure of damages would be the contract price, less the amount realized by sale, and the same principle applies in this case. Where the defendant in error had elected to hold the property as his own, to carry insurance upon it for his

protection, and has realized on account of such insurance the sum of $5,000.00, the amount so realized liquidates his damages to that extent.

In an action for the non-acceptance of property sold or contracted for, the measure of damages, *is the amount of actual injury sustained by the party in consequence of such non-acceptance.*

Sedgwick on the Measure of Damages, p. 312.

2nd Parsons on Contracts, page 484, note H.

The same rule was laid down in

Allen v. *Jarvis*, 20 Conn., p. 38.

Also in

Williams and Davis v. *Jones et al.*, 1st Bush, 621.

Ganson and others v. *Madigan*, 13th Wis., 67, was an action growing out of a contract of sale of a reaper. It appeared that when the defendant called for the reaper, he was shown a large number which were all alike, one of which was designed for him, but no one was specially designated or set apart for him, and he refused to take one. Upon the trial it was insisted upon the part of the defendant that it was essential for the plaintiffs to show that one of the machines had been so set apart for the defendant as to vest the title in him.

The court said: "We are satisfied that this would be "necessary before the plaintiffs could recover as for goods "sold and delivered, but are still of the opinion that it is not "necessary in order to maintain their action on the con- "tract for the refusal of the defendant to perform it.

"The distinction between these two causes of action is "well established, and the rule of damages in the one is very "different from that in the other. Where the vendor is "ready and willing to perform, and offers to do so, but the

" vendee refuses, even though the title is not vested in the " vendee, the vendor still has his action on the contract for " damages; but the rule of damages in such cases would be " the actual injury sustained, which is ordinarily the differ- " ence between the value of the property at the time of the " refusal and the price agreed on."

Dustan v. *McAndrews et al.*, 44th N. Y., page 72, was an action for damages for the non-acceptance of property under a contract of sale. The court here applied the same rule as to the vendor's measure of damages.

Also, in *Andrews* v. *Durant*, 1st Kernan, page 35, the court, after a full review of the authorities, adopts the rule contended for. The court further held, that as the property had not passed from the vendor at the time it was destroyed, he must bear the loss. That the destruction of the property was not caused by, nor was it in consequence of, the breach by the defendant of her contract.

Also, citing the case of *McConihe* v. *New York and Erie Railway Co.*, 20th N. Y., 495, as being every way in point.

Girard v. *Taggart*, 5th S. & R., 19, was an action for damages, resulting from the non-acceptance of goods sold at public auction. GIBSON, Justice, in delivering his opinion, said: " The damages recovered are not the price of " the goods sold, but a compensation for the disaffirmance " of the contract." * * * *

" Properly speaking, the seller cannot recover the *price* " where he has retained the goods, in consequence of the " buyer's refusal to comply with any part of the contract. " He recovers damages for the breach of the contract," &c.

We insist in this case, upon the application of the rule, that, as the property had not passed from the vendor at the time it was destroyed, he must bear the loss. But

if this rule is not to prevail, then we claim that the plaintiff could only recover his actual damages by reason of the breach of contract, and that this would be, under the most liberal construction, only the contract price, less the amount received on account of insurance.

As to the third error: In this instruction, the court assumes that there is evidence tending to support either of the three forms of contract referred to in said instruction. We have searched the record in vain for evidence tending to support such a contract as the one referred to by the "third phase." The instruction is also calculated to mislead the jury upon the question of delivery, and to lead them to infer, from the language of the court, that if the evidence supported the charge that the wood was cut and delivered upon the line of railroad according to the terms of the contract, that this amounted to a delivery to the defendant, and that the company would therefore be liable for the full contract price of the wood with interest.

The court evidently fell into the same error as in the case of *Heck* v. *The Insurance Companies.*

Referring to the question of delivery in the last cited case, the Supreme Court, (65th Ill., page 117,) say: "We "think this testimony most conclusively settles the ques- "tion of ownership, and the trouble has arisen from a mis- "use of the word 'delivered.' It is very evident the "wood was the property of appellee when cut, and "hauled, and piled at Kokomo — it was deposited, not "delivered, on the line of the railroad for the convenience "of the road — not delivered to them as their property, "&c."

It follows, therefore, that there being no delivery, the contract price, under the authorities above cited, is not the measure of damages.

As to the fourth error: There was not, upon the trial, and there is not in the record, a particle of evidence tending to

support this instruction. There is no evidence that the plaintiff below gave to the company any notice, whatever, that he had performed the contract upon his part, or that he had put upon the line of road from ten to twelve thousand cords of wood, or any other quantity. It is admitted that the defendant in error had cut and piled upon the right of way a large quantity of wood, and that he was persistent in demanding that the company should measure and receive the wood so put out, but the quantity of wood thus put upon the right of way was never known until in the summer of 1871, when the measurement was had for the purpose of ascertaining how much had been destroyed by fire.

It is true that the defendant in error, in November, 1870, two months before the expiration of the time within which this wood was to have been taken up by the company under the defendant in error's construction of the contract, called upon the general manager of the company and offered to extend the time of payment " and an abatement of some money " if he would then close it up, (printed record, page 17), but there is no evidence that the defendant ever requested of the plaintiff that he should delay his demand that such wood should be measured or paid for within a year, or that the plaintiff should not insist upon a strict performance of the terms of the contract, as to the time of measurement and payment and we cannot conceive why such a hypothetical contract should have been stated to the jury.

It has long been the rule of this Court that a charge of of court founded upon a hypothetical case, or upon a hypothetical state of facts of which there is no evidence, is error.

In *Etting* v. *The President, &c., of the Bank of the United States*, *11 Wheaton Reports*, *59*, it is held to be error for the judge to declare the law upon hypothetical

questions which do not belong to the case on trial in his charge to the jury. " And if it can have had any influence " on the jury, their verdict ought to be set aside." Also *Clarke* v. *Kownslar*, 10 *Peters*, 657.

United States v. *Breitling*, 20 *Howard*, 252, was an action brought against the defendant in error as one of the sureties on an official bond. Under the instruction given by the court to the jury, the verdict and judgment were in favor of the defendant. The court charged the jury: " That if they believed, from the evidence, that at the time " Breitling's name was signed to the bond, it was under- " stood and intended that other persons were to sign it as " obligors, and he was to have notice that they did so, and " who they were, and then if satisfied, was to acknowledge " the bond in presence of witnesses who were to attest it, " and if this was not done, and the bond was not after- " wards ratified by him, the jury ought to find for the de- " fendant." Commenting on this instruction, Chief Justice TANEY says: " It is clearly error in a court to charge a " jury upon a supposed or conjectural state of facts of " which no evidence has been offered. The instruction " pre-supposes that there is some evidence before the jury " which they may think sufficient to establish the facts " hypothetically assumed in the opinion of the court, and " if there is no evidence which they have a right to con- " sider, then the charge does not aid them in coming to " correct conclusions, but its tendency is to embarrass and " mislead them. It may induce them to indulge in con- " jectures instead of weighing the testimony.

" In the case before us, we do not see any evidence in " the record which tends in the least degree to prove any " one of the facts hypothetically assumed in the opinion. " If such testimony was given, it certainly does not appear " in the transcript, and upon this ground, without examin-

" ing further into the opinion of the court below, the judg-
" ment must be reversed."

In *Insurance Company* v. *Baring*, 20 *Wall.*, *page* 159, it is held that " when a prayer for instructions is presented " to the court, and there is no evidence upon the subject in " the case for the consideration of the jury, it ought always " to be withheld, and if it is given under such circum- " stances, it will as a general rule be regarded as error in " the court, for the reason that its tendency may be, and " often is, to mislead the jury, by withdrawing their atten- " tion from the legitimate points of inquiry involved in the " issue."

It is also held in *Insurance Company* v. *Baker*, 94 *U. S. page* 610, that the charge of the court must be supported by the evidence.

We will not multiply authorities, but rest our exception to this charge upon the undisputed fact that the contract referred to in the charge, is not the contract declared upon, and is without the slightest support by the evidence in the record. And under the authorities above cited the giving of the charge is sufficient error for the reversal of the judgment.

Applying the foregoing rules to the record, the necessary sequence is that the judgment of the lower court is excessive; that the actual loss or damage to the defendant in error cannot be measured by the contract price of the wood burned, with interest thereon.

A careful examination of the record shows that Heck never urged the present claim until the commencement of the action against the company in Indiana, in 1873. For two years he had been wholly silent as to the present claim, but diligent in the pursuit of the insurance companies, and not until after he had exhausted their entire liability did he bring forward this claim against the plaintiff in error. It now appears that it was not really Heck that

prosecuted the action in the Indiana Courts; that after he had realized $4,900 net out of his insurance (the policies were for $6,000) he assigned the balance of his claim to Lane & Owens, who conceived the idea of prosecuting the company for the full value at the contract price of the wood destroyed. Heck undoubtedly felt that he would be legally and morally estopped from setting up this claim against the company, and therefore transferred whatever interest he then had in the contract, leaving to his assignees the invention of a new demand and a new departure.

It appears also that under the instructions of the court the jury allowed interest from March, 1871, several months prior to the burning, evidently upon the theory that the cause of action accrued at that date. But Heck put no such construction upon the contract—he negatives that construction by his entire course of action during the years 1871 and 1872, and by his evidence in this and the two preceding actions. It was his property at the time of the fire. He had not in any manner parted with its title, retained the possession, exercised over it all necessary acts of ownership, protected himself as far as possible against loss, and actually received from the insurance companies the greater portion of his damages.

We therefore urge the recognition of the rule, supported as it is by the authorities herein cited—that as the property had not passed from the vendor at the time it was destroyed, he must bear the loss. But if this rule is not to prevail, then we respectfully submit that the judgment should be reversed for the errors apparent in the record, resulting from the instructions of the court below.

E. WALKER,
Att'y for Pl'ff in Error.

CHICAGO, Jan., 1880.

OFFICE SUPREME COURT U. S.
FILED
APR 8 1880
D. W. MIDDLETON, Clerk.

SUPREME COURT OF THE UNITED STATES.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY.
Plaintiff in Error
v.
JOHN HECK FOR USE OF LANE, ET AL.,
Defendant in Error.

Error to the Circuit Court of the United States, for the Northern District of Illinois.

MAY IT PLEASE THE COURT:

The errors assigned by the plaintiff in error cannot be noticed by this court, because no exceptions were taken to any of the proceedings in the court below.

There is nothing in the case worthy the attention of this court. The writ of error is absolutely frivolous, and the court is respectfully requested to award ten per cent. damages.

O. B. SANSUM,
For Defendant in Error.